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Law and Colonialism in China: A German Perspective*

Luigi Nuzzo

1. July 1900

On July 20, 1900 a young lieutenant of the Italian army, doctor Giuseppe Messerotti Benvenuti, was moved by watching the port of Naples disappear and the lights of the coast slowly going out in the dark of the evening. Java, together with the 'Royal Ships' Minghetti and Singapore, set sail and headed for Port Said in Egypt. From here the journey would continue to Tianjin, an unknown Chinese river city, via Suez, Aden, Singapore and Hong Kong.[1]

A few days earlier an international contingent, in which a small Italian detachment made up of sailors from the cruisers Elba and Carlotto took part, had freed the Western concessions of that city from the Boxer siege and had taken control of it. In Beijing, however, the situation remained particularly serious. After the killing of the German ambassador Clemens von Ketteler on 20 June and the subsequent declaration of war by Empress Cixi, the legation district was under Chinese fire and the hopes of saving the Westerners barricaded within it became increasingly dim.[2]

It was therefore necessary to act quickly and to take advantage, from the Italian government's perspective, of the crisis in the Far East so as not to miss the opportunity to regain a colonial respectability that the Adua's defeat and then the Chinese refusal to grant Sanmen Bay had perhaps undermined irreparably.[3] Italy, therefore took part in the international ex-

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1 G. Messerotti Benvenuti, *Dal Giava, 20 luglio 1900, in Un italiano nella Cina dei Boxer. Lettere (1900-1901)*, edited by N. Labanca, Associazione Giuseppe Panini archivi modenesi, Modena, 2000, p. 3.

2 D. Nowak, Der Tod des deutschen Gesandten Clemens von Ketteler, in M. Leutner und K. Mühlhahn (eds.), *Kolonialkrieg in China. Die Niederschlagung der Boxerbewegung 1900-1901*, Chr. Links Verlag, Berlin, 2007, pp. 111-117. Within a vast historiography, see P. Cohen, *History in Three Keys: The Boxers as Event, Experience and Myth*, Columbia University Press, New York, 1997. A 1963 film by Nicholas Ray, *55 Days at Peking*, was dedicated to the siege of the Boxers and is extremely interesting for the stereotypical representations it proposes.

3 On the relationship between Adua and the Chinese company see N. Labanca, Da Adua a Tientsin. Una missione umanitaria?, in *Un italiano nella Cina dei Boxer*, edited by Labanca, cit., pp. I-V. A reconstruction

pedition despite its inadequate resources and means, as Messerotti Benvenuti himself tells his mother in many letters.

On 20 July everything was finally ready, and King Umberto, in Naples, could review the troops leaving.

> "To you, ready to set sail, – he said – I bring you my greetings and those of the Fatherland, wishing the luck of your weapons. Not to conquer, but only to defend the sacred right of people and of trampled humanity you go to a distant region, where our flag has been outraged. At your mission, as on other occasions, you will have as companions the soldiers of the most powerful nations in the world. Be good comrades with them and know how to keep up the prestige of the Italian army and the honor of our country. So, go confidently, I will accompany you with the heart and God will bless your enterprise."[4]

Only seven days later, in the port of Bremen other soldiers ready to embark for China were waiting to hear the speech of their sovereign. The Norddeutscher Lloyd building was at their shoulders and in front, high on a platform, stood the figure of the Kaiser, William II. His speech, as Günter Grass recalls in a short story, stirred up the spirits and caused a scandal.[5] Great tasks awaited the Reich and the German army. The honor of Germany had been violated. The terrible crime the Chinese had committed, i.e. the killing of the German ambassador von Ketteler, had automatically placed China out of the consortium of civilized nations and its law. "The Chinese have overturned international law. They have mocked the sanctity of the ambassador, the hospitality duties in such an unprecedented way in world history".[6] It was not therefore just a matter of defending the rights of the people, as Umberto had said, but of avenging the injustice suffered and inflicting severe punishment on the Chinese. "Like a thousand years ago," the Kaiser said in a famous passage of his speech, later eliminated from the official versions – the Huns, under King Attila, made a name for themselves that still makes them appear mighty in tradition and in fairy tales, thus the name of the Germans in China can be confirmed by you for a thousand years, so that a Chinese never dares to meet eyes with a German".[7] No forgiveness, William II continued, was any longer possible, no

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of Sanmen's confused story is offered by R. Quartararo, L'affare di San-Mun. Un episodio dell'imperialismo coloniale italiano alla fine del secolo XIX, in "Clio" 33,3, 1997, pp. 453-498. See also the doctoral thesis by O. Coco, *Colonialismo europeo in Estremo Oriente. L'esperienza delle concessioni territoriali in Cina*, Edizioni nuova cultura, Rome, 2017, pp. 34 ss., which re-reads many of the documents studied by Quartararo.

[4] G. Cortesi, *Umberto I il buono. Memorie storico geografiche, aneddoti impressioni spigolature da libri e giornali*, Tipografia cooperativa editrice, Rome, 1900, p. 79. On the Italian participation in the international expedition against the Boxers see M. C. Donato, Italiani in Cina contro i Boxers, in "Rivista di Storia contemporanea", 14,2, 1985, pp. 169-206; and more recently L. de Courten, *Le regie truppe in Estremo Oriente. 1900-1901*, Stato Maggiore dell'Esercito, Rome, 2005.

[5] G. Grass, *Mein Jahrhundert*, Deutscher Taschenbuch Verlag, München, 1999, pp. 7-10.

[6] Wilhelm II, In Bremerhaven, 27. Juli 1900, in *Die Reden Kaiser Wilhelms in den Jahren 1896–1900*, edited by J. Prenzler, vol. II, Reclam, Leipzig, 1904, pp. 209–212. Unless otherwise indicated, each translation in the present paper is mine.

[7] The passage from the speech of William II, later removed in the official version, is published in M. Görtemaker (ed.), *Deutschland im 19. Jahrhundert. Entwicklungslinien*, Verlag für Sozialwissenschaften, Opladen, 1996, p. 35; see: http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=755.

mercy could now be shown towards the prisoners. The military strength of the European and Japanese powers would have opened "the path of civilization" and allowed the definitive affirmation of the values and law of the Christian West even in distant China.

The speeches by the German emperor and the "good" Italian king deserve our attention. Both of them, albeit different in tone and in the argumentative strategies used, are crossed by the same paradox. In fact, China had not been granted the opportunity to enjoy the fruits of that law that the Boxer insurrection and the killing of Ketteler would have violated. According to the Western standards of civilization, lacking full legal capacity, the Celestial empire was not yet a subject of international law, but just subjected to international law. The murder of the German ambassador itself had become a crime for which an entire nation was called to answer. This not only confirmed the desirability of the international police operation undertaken by the Western powers and Japan, but also allowed for pure, absolute violence to be deployed against the Chinese, devoid of the filters or limits provided for by international law.

The exceptional nature of the response was therefore justified and offered further confirmation of the fact that China was unable to satisfy the principle of reciprocity by conforming its actions to the law and practices of the international community. The violence against Westerners, Catholic missionaries and even more the killing of an ambassador attested, international lawyer, to the persistence of a profound historical and cultural gap. It made it impossible to form a legal conscience or awareness, preventing China both from becoming a subject capable of producing international law, and from providing adequate guarantees in the processes in which Western citizens and interests were involved.

If twenty-five years earlier European international lawyers had still been able to ask themselves "within what limits and under what conditions unwritten international law was applicable to Eastern nations", at the beginning of the new century that question no longer made sense.[8] If, in other words, in the 1870s the differences between East and West had not prevented the jurists of the *Institut de droit international* from thinking about oriental populations within the international community as well as from promoting a broad discussion on the possibility to transplant international law beyond its 'natural' borders, the Boxer revolt had transformed those same social, cultural, legal and economic differences into insurmountable barriers. Not only did they continue to divide the West from the rest of the world, but made any theoretical reflection on the universality of international law a rhetoric exercise. International law was a product of the states of the Christian West and could not be extended to those political subjects who did not share European history and values or were not capable

On this point, see B. Sösemann, "Pardon wird nicht gegeben". Staatliche Zensur und Presseöffentlichkeit zur "Hunnenrede", in Leutner und Mühlhahn (eds.), *Kolonialkrieg in China*, cit., pp. 118-122.

[8] The jurists of the Institut de droit International dedicated themselves to the study of the conditions of applicability of European law in the East. In the session of The Hague in 1875 they set up a special commission for this purpose. The sentence quoted in the text can be read in M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, CUP, Cambridge, 2001, pp. 132-136; L. Nuzzo, *Origini di una scienza. Diritto internazionale e colonialismo nel XIX secolo*, V. Klostermann, Frankfurt am Main, 2012, pp. 202-221.

of satisfying the standards of statehood by which they themselves would be evaluated for access to the great *family of nations*. International law, therefore, not only was inapplicable to China, but the same treaties that between 1842 and 1901 should have facilitated its entry into the international community instead produced a violent compression of its sovereignty.[9]

The story told in the following pages is one of the possible stories of Western colonialism in China. Through a circular path that has its starting and ending point in the Boxer insurrection, it intends to reconstruct the strategies followed by Germany, between the mid-nineties of the nineteenth century and the beginning of the new century, to shape the legal occupation of the Chinese territory. Its protagonists are therefore mainly the jurists and the unscrupulous dogmatic constructions they resorted to in order to empty Chinese sovereignty from within. Taking as an objective the analysis of the debate accompanying the foundation of the first German territorial settlements in China allows us to rediscover the centrality of the legal dimension and, in particular, of private law, in the definition of Western colonial discourse. At the same time, it allows us to look more consciously at the history of international law and at the relationship between law and violence, thus allowing the darker (and hidden) side of modern international law to emerge. The strange leases that allowed the founding of the German settlements in China thus constitute an extraordinary observation point to read the theoretical discussions by European jurists on the exceptional nature of non-Western spaces and their populations, to understand to what extent it was possible to transform 'pieces' of the Chinese empire into a new social space and to analyze the changes the concept of sovereignty underwent beyond Western borders.[10]

2. Jurists speak

Only three months after the Kaiser's speech on July 20, 1900 an article by Georg Jellinek, an undisputed star of German-speaking public law, appeared in the *Deutsche Juristen-Zeitung*. In his brief speech, the jurist tried to read the dramatic war events of recent months through the categories of international law. According to Jellinek, after the landing in China of the German troops called to "rightly" avenge the offense suffered, an in-depth study of relations between China and the Western "*Kulturstaaten*" could no longer be postponed. From his

[9] M. Craven, What happened to the Unequal Treaties? The Continuities of Informal Empire, in "Nordic Journal of International Law", 74, 2005, pp. 335–382; P. Kristoffer Cassel, *Grounds of Judgment. Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*, OUP, Oxford, 2012, pp. 39 ss. St. Kroll, *Normgenese durch Re-Interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert*, Nomos, Baden-Baden, 2012, pp. 27 ss.

[10] M.A. Carrai, *Sovereignty in China. A Genealogy of a Concept since 1840*, CUP, Cambridge, 2019, pp. 23 ss. Limited to the Italian experience only, but extremely interesting is the essay by P. Costa, Il fardello della civilizzazione. Metamorfosi del concetto di sovranità nella giuscolonialistica italiana, in "Quaderni Fiorentini", 34-35, 2004-2005, vol. 1, pp. 169-257.

perspective, however, it was not simply a matter of ascertaining the violations of international law due to China's conduct, nor of verifying whether a transfer of Western normativity was still possible. It therefore seemed a useless exercise to continue to discuss the legal qualification of the military actions undertaken by the allied powers against China. The question was not in fact whether such actions could be considered as a "real" war, or a simple reprisal, but rather concerned the way in which relations between China and the civilized powers should be regulated according to international law.[11]

For Jellinek, an adequate response required clearing the field of myths and "popular beliefs": international law was not a "necessary" right and therefore always applicable. Its validity was however limited to states that recognized its existence and accepted its binding nature. This did not mean a return to the old representation that limited the effectiveness of international law to the space of the Christian West. According to the Austrian jurist, the entry of the Ottoman Empire and even more the adherence of Japan to Western values had shown the overcoming of the cultural-religious matrix as the foundation of international law.

The Chinese case, however, was completely different. It was in fact indemonstrable, as Jellinek wrote, that China had adopted international law. Under the pressure of the European powers it had only interrupted the traditional policy of closure towards the West, by agreeing to entertain political, legal and commercial relations, but had not questioned the assumptions of that political line.

To Jellinek, it continued to represent itself as the Middle Kingdom and to consider foreign states as vassals, thus bringing back into the category of privileges what should have been the rights of their diplomatic representations.[12] The consequences were very serious and testified to the persistence of a cultural deficit. "For China an attack on an ambassador – he wrote – only means a breach of contract, it does not represent the violation of a generally recognized rule of international law". In other words, China lacked the awareness that the progress made by international law over time was inextricably linked to the recognition of the necessary and binding nature of international agreements and treaties.

> "International law – Jellinek continued with his usual clarity – does not exist until the moment States recognize that they are bound by the agreements and treaties they have stipulated, regardless of the changing demands of daily politics. China has not yet reached this highest level and therefore one or the other statement of international law can find temporary recognition; however, this does not change the fact that up to now it has placed itself outside the community of international law."[13]

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[11] G. Jellinek, China und das Völkerrecht, in "Deutsche Juristen-Zeitung", 1.10.1900, p. 401, re-published in Id. *Ausgewählte Schriften und Reden*, vol. 2, O. Häring, Berlin, 1911, pp. 487-495. Cf. Kroll, *Normgenese durch Re-Interpretation*, cit., pp. 44–45. More generally, on Jellinek's influence on internationalist doctrine, Koskenniemi's *The Gentle Civilizer of Nations*, cit., pp. 198-208 always constitutes a point of reference.

[12] Obviously, Chinese self-representation was different. On this point, see Carrai, *Sovereignty in China*, cit., pp. 87 ss.

[13] Jellinek, *China und das Völkerrecht*, cit., p. 493.

The war that was recently ended confirmed, again, China's extraneousness to the European system of values and to the Western idea of progress. At the same time, it showed how that supposed extraneousness legitimized the violence of a response devoid of the limits imposed by international law. There would have been no violation of international law, nor would it have been possible to appeal to it when one was unable, as the case of China demonstrated, to grasp its "spirit".

Perhaps one day, Jellinek continued, if China had agreed to deeply rethink the relationship with its own tradition and to introduce the reforms requested by the West, it could have been admitted into the restricted club of 'civilized nations' to enjoy its own rights.

Meanwhile, in the long and uncertain time of waiting, on the one hand, Jellinek entrusted China to the humanity principle to which victorious powers were subject as civilized nations, even against the most barbaric enemies. On the other, the Chinese case represented a chance for him to develop an analysis that he had been carrying out for some years on relations between State and territory and which led him to the publication of his impressive *Allgemeine Staatslehre* in July 1900.

In 1896, in fact, taking up some reflections already contained in his early work *Die Lehre von den Staatenverbindungen*, he had published in Heidelberg a short book with the ambiguous title *Staatsfragmente* which was destined to leave a mark in the debate of twentieth-century legal doctrine.[14]

For the Austrian jurist, the understanding of reality and its tracing within (new) legal categories were possible only by assuming the awareness of the conceptual limits of sovereignty and State. Sovereign rights, territory and subjects still constituted the necessary elements of statehood, but the absence of one of them, even the most important one, the governmental power, did not necessarily condemn the political formation that lacked it within simple administrative bodies. Indeed, sovereignty was no longer an essential characteristic of the State, but only "a historical category necessary for the understanding of the contemporary State system, but not of the State itself".[15] Jellinek did not manage to free himself from the *idolon* of sovereignty and continued to use it in the observation and reconstruction of reality in legal terms. At the same time, however, he was well aware that only a gaze conditioned by a "doctrinal preconception" would not have noticed the existence of political subjectivities which, albeit devoid of sovereign powers as subject to a superior power, could not be reduced to simple administrative bodies. Territory, subjects and more or less extensive forms of administrative, legislative and judicial autonomy made them intermediate bodies, or more precisely *Staatsfragmente*.[16]

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[14] G. Jellinek, *Die Lehre von den Staatenverbindungen*, Hölder, Wien, 1882, pp. 36 ss.; Id., *Ueber Staatsfragmente*, Koester, Heidelberg, 1896. The text was then included in id., *Allgemeine Staatslehre*, O. Häring, Berlin, 1900.

[15] Jellinek, *Ueber Staatsfragmente*, cit., p. 11.

[16] L. Nuzzo, Autonomia e diritto internazionale. Una prospettiva storico giuridica, in "Quaderni Fiorentini", 43, 2014, vol. 2, p. 685.

With this term Jellinek introduced an extremely flexible category able to include all those political formations that could not be defined as a State notwithstanding they have some characteristics of the latter, or administrative districts despite being subjected to a higher authority. It included, among others, some territories formally belonging to the Ottoman Empire on which it did not exercise its full sovereignty, countries with ambiguous status such as Croatia or Finland, British colonies such as Canada and finally the German colonial possessions. The *Schutzgebiete* were in fact subject to the territorial sovereignty of the empire but were not considered as territory of the empire. Only by constitutional law they could be equated with a foreign State and as such they had their own territory and subjects. Devoid of State subjectivity and as mere object of the governmental power of the Reich, they returned only a blurry image of a State. According to Jellinek, it is therefore more correct to forge a new category for them, opening the juridical discourse to the mutability of historical reality.[17]

China, of course, was not a mere fragment of a State, nor could it be considered as a semi-sovereign State, despite the treaties stipulated with the Western powers having introduced severe restrictions on the exercise of its sovereignty. Jellinek's proposal, however, allowed the institutional anomalies produced by "unclear political situations" mostly in colonial or semi-colonial contexts to be traced back into a new legal category capable of reflecting the complexity of the political framework and whose flexibility could also offer a theoretical key to legally interpret the territorial concessions made by China to Western powers, Russia and Japan since 1842.[18]

3. The Invention of a "Musterkolonie"

The article in the *Juristen-Zeitung* was not the only contribution that Jellinek dedicated to China, however.[19] In 1898, two years before the Ketteler's assassination and the Kaiser's fiery speech, the killing of two German missionaries had offered the Reich the long-awaited opportunity to take possession of Jiaozhou Bay in the province of Shandong and, to our jurist, to turn his gaze to the Far East.[20]

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17 Jellinek, *Ueber Staatsfragmente*, cit., pp. 18-19.

18 Jellinek, *Die Lehre von den Staatenverbindungen*, cit., p. 71. Obviously writing in 1882, the opportunity to reflect on the limits of the concept of sovereignty and the need to redefine the relations between State and territory was given by the Treaty of Berlin (1878).

19 G. Jellinek, Die staats- und völkerrechtliche Stellung Kiautschous, in "Deutsche Juristen-Zeitung", 15.6.1898, p. 253, 305, then re-published in Id., *Ausgewählte Schriften und Reden*, cit., vol. 2, pp. 496-507.

20 See J. Schrecker, *Imperialism and Chinese Nationalism: Germany in Shantung*, Harvard University Press, Harvard, 1971. On the killing of the two missionaries, J. Esherick, *The Origins of the Boxer Uprising*, Berkeley University Press, Berkeley, 1987, pp. 123-135; on the German missionary activity in Shandong and in particular on the role of Bishop Anzer, see G. Steinmetz, *The Devil's Handwriting: Precoloniality and the*

With the victory of Japan over China in 1894 and the signing of the Shimonoseki treaty the following year (17.4.1895), the political framework in Asia had profoundly changed. Not only had Japan become the new hegemonic power, but it represented itself and asked to be recognized as the first non-Western State that had assimilated European civilization and was able to observe its international law.[21] China had had to accept the extension of the most favored nation clause, the independence of Korea, the cession of Taiwan, the Liaodong Peninsula, the Pescadores Islands. It had had to pay a heavy indemnity and to consent to the opening of four port cities to Japanese trade.[22] Only six days after the signing of the treaty, on the initiative of Tsar Alexander II who was interested in obtaining an ice-free naval station at Port Arthur, in the extreme southern offshoot of the Liaodong peninsula Russia, France and Prussia asked Japan for its demotion to China. The request was accepted, but it was now clear that from that moment on they would have had to deal with a new cumbersome protagonist.[23] In fact, in 1896 a trade and navigation treaty was signed which ensured Japan a privileged position in maritime and commercial relations with China and in the following two years the cities of Hangzhou, Soochow, Hankou, Tianjin, Amoy, Foochow and Sashi hosted the first concessions from a non-Western country.[24] The European powers tried to run for cover, occupying between 1895 and 1898 some cities whose position was strategic from a military point of view and which were fundamental both for the control of economic traffic in the Chinese sea and for the distribution of Western products throughout the empire. Hence, in the same year that the signing of the Shimoseki peace treaty, under the pretext of supporting the Chinese request for the return of the Liaodong peninsula, Germany imposed on China the opening of a concession in Tianjin and Hankou.[25] Three years later, in 1898,

German Colonial State in Qingdao, Samoa, and Southwest Africa, Chicago University Press, Chicago, 2008, pp. 416-421; 433 ss.

21 In this sense it is extremely interesting to read the interpretation of the war events offered by Naigo Ariga, *La guerre sino-japonaise au point de vue du droit international*, Pedone, Paris, 1896 and Sakuyè Takahshi, *Cases on International Law during the Chino-Japanese War*, CUP, Cambridge, 1899. The first volume opens with a preface by Paul Fauchille, while the second contains a preface by Thomas E. Holland and an introduction by John Westlake, Sara C. Paine, *The Sino-Japanese War of 1894-1895. Perception, Power, Primacy*, CUP, Cambridge 2003. On relations between China and Japan, see U.M. Zachmann, *China and Japan in the late Meiji Period. China Policy and Japan's Discourse on National Identity, 1895-1904*, Routledge, London 2009. On relations between Germany and Japan, with particular reference to the economic plan, see W. Bauer, *Tsingtau 1914 bis 1931*, Iudicium, Munich 2000, pp. 36-44.

22 Treaty of Peace, 17.4.1895 in J. MacMurray, *Treaties and Agreements with and concerning China*, vol. 1 (*Manchu Period 1894-1991*), OUP, New York 1921, pp. 18-25.

23 Convention for the retrocession by Japan to China of the Southern portion of the Province of Féng-Tien (Liaotung Pensinsula), 8.11.1895, ibid., pp. 50-53.

24 M. Peattie, Japanese Treaty Port Settlements in China, 1895-1937, in P. Duus, R.H. Myers and M. Peattie (eds.), *The Japanese Informal Empire in China, 1895-1937*, Princeton University Press, Princeton, 1989, pp. 166-209; a history of concessions from the Japanese perspective can be found in Ueda Toshio, *Shina ni okeru sokay no kenkiu*, Ganshodo, Tokyo, 1941.

25 The two agreements were signed on October 3 in Hankou and on October 30, 1895 in Tianjin, cf. MacMurray, *Treaties and Agreements with and concerning China*, cit., vol. 1, pp. 42-50. For a synthetic comparison between the German colonial experience and the Austrian one in China, see M. Gotteland,

with the same motivation the Russians and French also obtained a concession to Hankou,[26] while in Port Arthur (Lüshun), a Russian settlement was established with a contract lasting twenty-five years, and in Guangzhouwan a French one for a period of ninety-nine years.[27] In order to stem the German and Russian expansionist thrust in northern China, on the one hand, and the French influence in the southern regions, on the other, guaranteeing at the same time adequate protection in Hong Kong, Great Britain stipulated two leases agreements which ensured control of Weihaiwei respectively for twenty-five years and of the Kowloon peninsula (the so-called New Territories) for ninety-nine years.[28]

Also in 1898 the Reich arrived first and after having occupied Jiaozhou Bay militarily, on March 6, 1898 it stipulated a *Pachtvertrag* with China which became the model to which all the other powers referred in the following months. With this contract, Germany rented the occupied territory (an area of about 500 kilometers) for 99 years and obtained the neutralization of a band of another 50 kilometers around the bay for the passage of troops.[29] A little more than a month later, on April 27, 1898 an imperial decree attributed colonial character to the new possession and, by including it in the category of the *Schutzgebiete*, tried to erase all the doubts and ambiguities which that strange lease had aroused.[30]

L'Allemagne et l'Autriche-Hongrie en Chine, 1895-1918, in "Revue d'Allemagne et de pays de langue allemande", 48,1, 2016, pp. 43-55.

[26] On the French presence in Hankou, see the doctoral thesis by D. Rihal, *La concession française de Hankou (1896-1943): de la condamnation à l'appropriation d'un héritage*, Atelier national de reproduction des thèses, Lille, 2008; on the Russian concession, see K. Eiermann, The Russian Concession in Wuhan (1896–1925): Imperialism and Great Power Rivalry, in "Comparativ", 15, 2005, pp. 39-49; A. Crawford, Imagining a Russian Concession in Hankou, in "The Historical Journal", 61,4, 2018, pp. 969-989.

[27] The Convention for the Lease of the Liaotung Peninsula, 27.3.1898, J. MacMurray, *Treaties and Agreements*, cit., vol. 1, pp. 119-123. The French occupied Guangzhouwan on April, 22nd 1898. A very useful chronological overview of foreign concessions in China can be retrieved at the following link http://www.worldstatesmen.org/China_Foreign_colonies.html.

[28] The two lease agreements were signed respectively on 1.7.1898 and on 9.6.1898, cf. C. G.S. Tan, *British Rule in China: Law and Justice in Weihaiwei 1898–1930*, Wildy, Simmonds & Hill, London, 2008 and W. Smith, *Unequal Treaty 1898–1997. China, Great Britain and Hong Kong's New Territories*, OUP, Oxford, 1980.

[29] The bay was occupied by the troops of Admiral Otto von Diederichs on November 14, 1897, a few days after the killing of the two German missionaries, see T. Gottschall, *By the Order of the Kaiser: Otto von Diederichs and the Rise of the Imperial German Navy 1865-1902*, Naval Institute Press, Annapolis, 2003; and, above all, K. Mühlhahn, *Herrschaft und Widerstand in der „Musterkolonie" Kiautschou. Interaktionen zwischen China und Deutschland, 1897-1914*, Oldenbourg, Munich, 2000, p. 94, to which I refer for a careful reconstruction of the German presence in Qingdao. The catalog of a beautiful exhibition held at the Deutsches Historisches Museum in Berlin from 27 March to 19 July 1999 is also particularly interesting: H.M. Hinz and C. Lind (eds.), *Tsingtau. Ein Kapitel deutscher Kolonialgeschichte in China 1897-1914*, Minerva, Berlin, 1999. In the rich contemporary bibliography see at least O. Hövermann, *Kiautschou. Verwaltung und Gerichtsbarkeit*, Mohr, Tübingen, 1914; and, for an effective synthesis, F. Schack, *Das deutsche Kolonialrecht in seiner Entwicklung bis zum Weltkriege. Die allgemeinen Lehren. Eine berichtende Darstellung der Theorie und Praxis nebst kritischen Bemerkungen*, L. Friederichsen & Co, Hamburg, 1923, pp. 161 ss.

[30] The *Pachtvertrag* of March 6, 1898 by which China ceded Jiaozhou Bay to the German Reich for ninety-nine years and the Kaiser's decree of April 27, 1898 are published in the *Handbuch für das Schutzgebiet Kiautschou*, edited by F. W. Mohr, Walter Schmidt, Tsingtau, 1911, pp. 1-6. The two texts have recently

Map of Kiautschou[31]

been re-edited in *Musterkolonie Kiautschou*: *die Expansion des Deutschen Reiches in China: deutsch-chinesische Beziehungen 1897 bis 1914: eine Quellensammlung*, edited by M. Leutner und K. Mühlhahn, Akademie Verlag, Berlin, 1997, respectively pp. 164-168; 205-209.

31 http://www.ub.bildarchiv-dkg.uni-frankfurt.de/Lexikon-Texte/_karten/Kiautschou/Topkarte.jpg
The map is published in *Grosser Deutscher Kolonialatlas*, edited by P. Sprigade and M. Moisel. Kolonial-Abtheilung des Auswärtigen Amts, Reimer, Berlin, 1910.

From a constitutional point of view, this could have alleviated the classification anxiety of jurists, as Jellinek himself did not fail to underline, by excluding the *Sonderstellung* of Jiaozhou. Transforming the bay into a *Schutzgebiet* by decree and subjecting it to the Kaiser's *Schutzgewalt* meant, in fact, excluding that it was part of the Chinese Empire and, at the same time, that it could be considered a territory of the Reich (*Reichsgebiet*). It was therefore a 'normal' colonial possession, constitutionally similar to the protectorates already established in Africa or the Polynesian islands. It also projected into the Far East the insuperable paradox of territories considered *Ausland* for constitutional law and *Inland* for international law, which were confined by German law to the elusive category of "aggregates", "appendices", "fragments" or "pertinences" and condemned to be a suspended space between the metropolis and a foreign State.[32]

In this case, the use of a private law instrument, i.e. the lease, made it possible to recognize the formal Chinese sovereignty. At the same time, its prolonged duration would have allowed Germany to empty its sovereignty from within, reserving it the exercise of full governmental power and preventing China from issuing any regulatory or administrative act without its consent.[33] It was an extremely effective operation, capable of transferring territorial sovereignty (*Gebietshoheit*) to the Reich without qualifying the occupied area as the territory of the empire. On the one hand, in fact, since the occupation did not follow a formal declaration of war, it was not necessary for the government to obtain the approval (*Zustimmung*) of the Federal Council. On the other, since it was only a lease, albeit *ad longum tempus*, it was not sufficient to determine a territorial increase and its purchase did not therefore constitute a violation of Article 1 of the 1871 German constitution.

The founding act of the German presence in Jiaozhou Bay therefore remained the taking of possession. A primitive, deeply juridical act which, as Carl Schmitt pointed out, was at the same time free from any legal dimension and endowed with constitutional force. In fact, the occupation made it possible to define a new political and social order. It was able to activate a constituent legal process, through the identification of a radical title that could be validly opposed to anyone else who had requested that same tract of land.[34]

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[32] Cf. Nuzzo, *Origini di una scienza*, cit., p. 270

[33] Vertrag zwischen Deutschland und China, 6.3.1896, art. 1, in *Handbuch*, edited by Mohr, cit., p. 1: "Seine Majestät der Kaiser von China von der Absicht geleitet, die freundschaftlichen Beziehungen zwischen China und Deutschland zu kräftigen und zugleich die militärische Bereitschaft des chinesischen Reiches zu stärken, verspricht, indem er sich alle Rechte der Souveränität in einer Zone von 50 km (100 chinesischer Li) im Umkreis von der Kiautschou-Bucht bei Hochwasserstand vorbehält, in dieser Zone den freien Durchzug deutscher Truppe zu jeder Zeit zu gestatten, sowie daselbst keinerlei Maßnahmen oder Anordnungen ohne vorherige Zustimmung der deutschen Regierung zu treffen und insbesondere einer etwa erforderlich werdenden Regulierung der Wasserläufe kein Hindernis entgegenzusetzen. Seine Majestät der Kaiser von China behält sich hierbei vor, in jener Zone im Einvernehmen mit der deutschen Regierung Truppen zu stationieren sowie andere militärische Maßregeln zu treffen".

[34] L. Nuzzo, Rethinking Eurocentrism. European Legal Legacy and Western Colonialism, in M. Brutti and A. Somma (eds.), *Diritto: storia e comparazione. Nuovi propositi per un binomio antico* (Global Perspectives on Legal History 11), Max-Planck-Institut für europäische Rechtsgeschichte, Frankfurt am Main, 2018, pp. 358-378, http://dx.doi.org/10.12946/gplh11.

As a way of acquiring property on an original basis also for international law, occupation had played a pivotal role in nineteenth-century colonial legal discourse. It had allowed international lawyers to perfect the contracts with which the polities of sub-Saharan Africa had ceded their territories to the European states, and to deny both that those contracts were comparable to international treaties and that populations marked by a deficit of statehood and legal subjectivity could transfer rights that they did not have as they were unable to grasp their legal dimension.[35]

Recently historians and jurists have come back to focus on occupation and in particularly on the occupation of Africa, analyzing the role played by African populations and the difficulties of the Western jurists to define the value of the agreements signed with the indigenous chiefs.[36] The colonial policy followed by European States and private companies showed that they were a valid instrument for settling on territory or to establish a protectorate, but on a theoretical level they did not be considered, with few exceptions able to transmit a valid claim of acquisition.[37] Occupation was always necessary. Only the occupation, in fact, would have made the protectorate effective and would have interdicted, once performed its

[35] For a broader analysis of the concept of occupation and a survey of the different answers given by Western international lawyers to the problem concerning the legal value of the treaties signed with African rulers, see my previous work, *Origini di una Scienza*, pp. 243 ss. In an extensive historiography see at least C. H. Alexandrowicz, *The European African Confrontation A Study in Treaty Making*, Sijthoff 1973; J. Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart*, Steiner, Stuttgart, 1984; Koskenniemi, *The Gentle Civilizer of Nations*, cit., chapter. 2, in particular pp. 152 ss.; R. Lesaffer, Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription, in "European Journal of International Law", 16, 2005, pp. 25-58. On occupation as most powerful tools employed in Western political thought to explain the origin of property, the political society itself, solving the problem of sovereignty and finally showing the imperial dimension of Western political thought, see now A. Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000*, CUP, Cambridge, 2014.

[36] M. van der Linden, *The Acquisition of Africa (1870-1914). The Nature of International Law*, Legal Publishers, Oisterwijk, 2014 (then republished by Brill 2016), pp. 227 ff.; with reference to the French and British experience in West Africa, see respectively Mamadou Hébié, *Souveraineté territoriale par traité: une étude des accords entre puissances coloniales et entités politiques locales*, Presses Universitaires de France, Paris, 2015 and I. Van Hulle, *Britain and International Law in West Africa. The Practice of Empire*, OUP, Oxford, 2020.

[37] With different nuances K. F. von Stengel, *Die Rechtsverhältnisse der deutschen Schutzgebiete*, Mohr, Tübingen und Leipzig, 1901, p. 8; H. Bonfils, *Manuel de droit international public (droit des gens). Destiné aux étudiants des Facultés de Droit et aux aspirants aux fonctions diplomatiques et consulaires*, Rousseau, Paris, 1894, p. 300; F. Despagnet, *Cours de droit international public*, Larose, Paris, 1894, p. 425; C. Salomon, *L'occupation des territoires sans maître. Étude de droit international*, Giard, Paris, 1889, p. 206; G. Jèze, *Étude théorique et pratique sur l'occupation comme mode d'acquérir les territoires en droit international*, Giard et Briére, Paris, 1896, p. 115; E. Engelhardt, Étude sur la déclaration de la Conférence de Berlin relative aux occupation, in "Revue du droit international et de législation comparée", 18 (1886), p. 582, recognized to the African chiefs some right of sovereignty and attributed to the agreements stipulated with the natives the value of international treaties, considering therefore as possible a derivative purchase of the African territory. However, none of these jurists ever came to recognize the political organization of indigenous peoples on a level comparable to that of European states, nor did they ever accept the idea of considering them in a position of equality.

notification, the action of other colonizing powers on the same territory, or would have been able to refine the agreement, turning a derivative claim of acquisition into an original one.[38]

Obviously, this was not the case with China, formally a sovereign State deemed capable of entering into international agreements. However, the history of international relations between China and European powers offers a different story. Its entry into the international community was possible only by suspending the application of international law and entrusting relations with the Celestial Empire to diplomatic practice and consular law. Lacking full international legal subjectivity, the China imagined by jurists and Western States experienced a condition of exceptionality that prevented it from participating in the production of international law and justified the application of exceptional measures.[39]

The private law contract by which Germany leased Jiaozhou Bay and then the Kaiser's decree by which the Reich had unilaterally transformed the Chinese possession into a *Schutzgebiet* are an excellent example.

From a legal point of view, however, the use of private-law instruments was not an absolute novelty. With the 1878 Treaty of Berlin, in fact, the Ottoman Empire had ceded the administration of Bosnia and Herzegovina to the Habsburg Empire and in 1878 the Turkish sultan had allowed Great Britain to "occupy and administer" the island of Cyprus until Russia returned Batoum, Ardhan and Kars to him.[40]

Due to the existence of certain conditions or political needs, in both cases there was not a real annexation but a provisional entrustment of the sole sovereign rights exercise by the Ottoman Empire which formally remained the legitimate owner. In the presence of an absolute cession of this exercise and considering the absence of any temporal limitation, however, the Ottoman sovereignty over Cyprus, Bosnia and Herzegovina became a vague memory,

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[38] Nuzzo, Territory, Sovereignty and the Construction of the Colonial Space, in M. Koskenniemi, W. Rech, M. Jiménez Fonseca, *International Law and Empire. Historical Explorations*, OUP, Oxford, 2017, p. 282.

[39] Li Chen, Affective Sovereignty, International Law and China's Legal Status in the Nineteenth Century, in Zvi Ben-Dor Benite, Stefanos Geroulanos and Nicole Jerr (eds.), *The Scaffolding of Sovereignty: Global and Aesthetic Perspectives on the History of a Concept*, Columbia University Press, New York, 2018, pp. 421-439; broadly Carrai, *Sovereignty in China*, cit., pp. 82 ff.

[40] Traité de Berlin, 13.07.1878, art. 25, edited by B. Brunswik, *Le Traité de Berlin annoté et commenté*, Plon, Paris, 1878, p. 101. The 'details' were specified with the Convention of 21.4.1879 which states that the occupation would not have prejudiced the sultan's right of sovereignty, in *Nouveau Recueil général de Traités*, edited by Georg Friedrich von Martens, C. Samwer, J. Hopf, deuxième série, t. 4, Dieterich, Gottingue, 1879, p. 422. Cf. L. Classen, *Der völkerrechtliche Status von Bosnien-Herzegovina nach dem Berliner Vertrag vom 13.7.1878*, Peter Lang, Frankfurt am Main, 2004, in particular pp. 64 ss.; E. Radušić, The Ottoman Wrong Horse? The Question of Bosnia and Hercegovina in the Last Phase of the Eastern Crisis, in M.H. Yavuz with P. Sluglett (eds.), *War and Diplomacy. The Russo-Turkish War of 1877-1878*, The University of Utah Press, Salt Lake City, 2011, pp. 165-97. La Convention d'alliance défensive entre la Grande-Bretagne et la Turquie was signed in Istanbul on 4.6.1878, v. in particular art. 1, in "Archives Diplomatiques, Recueil international de diplomatie et d'histoire", second series, 23,1882-1883, VI, p. 315. Cf. Brunswik, *Le Traité de Berlin*, cit., pp. 122-124. The subsequent Convention between the two empires of 1.7.1878 specified the limits of English occupation, (also in "Archives Diplomatiques", ibid., pp. 315-316). The legal and judicial organization was regulated the following year with two ordinances (on 21.12.1878 and on 17.1.1879).

revealing a distance that could no longer be bridged between the world of facts and the world of law and leaving to jurists any re-thinking of the old categories offered by international law as well as the re-reading of the relationship between space and law in new forms more suited to the times.

In Shandong too there had been no formal land transfer or definitive transfer of sovereignty. According to Jellinek China kept the *nudum ius*.[41] "To prevent any conflict", it had 'only' pledged not to exercise its sovereign rights, transferring them to Germany limited to the duration of the contract and within an area identified rather generically in the same agreement, which a mixed commission should have defined more precisely later. Not only that. The two parties respectively undertook not to transfer the ceded rights to third parties and not to sublease the territory received. In any case, however, if Germany had decided to return Jiaozhou Bay to China before the deadline stipulated in the contract, the latter would have compensated the Reich for the expenses incurred and would have identified another more suitable location. Finally, as already mentioned, the agreement also provided for a protection strip that surrounded the bay for a radius of 50 kilometers, as well as territorial strips intended for mining, about six kilometers wide along two railway lines whose construction had been granted by China with the same lease.[42] Within the buffer zone, the Celestial Empire formally retained the full exercise of its governmental power and the ability to maintain its own army, but promised not to take any action without prior agreement with Germany and constituted a right of way in its favor in order to allow the troops of the Reich to reach and protect the future settlement, effectively bringing those territories back into the sphere of German interest or influence. Unknown to international law, these ambiguous institutions had been introduced to reserve the right to the future exploitation of a specific territory to the European powers engaged in the partition of the African continent, thus preventing conflicts between them.[43] Although in practice the sphere of influence and sphere of interest

[41] Jellinek, Die staats- und völkerrechtliche Stellung Kiautschous, cit., p. 498. Also P. Laband, *Das Staatsrecht des Deutschen Reiches*, 5th ed., J.C.B. Mohr, Tübingen, 1911, vol. 2, p. 281; Schack, *Das deutsche Kolonialrecht*, cit., p. 248.

[42] Vertrag zwischen Deutschland und China, 6.3.1898, II. Teil Art. 1: "Die Kaiserlich chinesische Regierung gewährt Deutschland die Konzession für folgende Bahnlinien in der Provinz Schantung: I. Von Kiautschou über Weihsien […] nach Tsinanfu und von dort in der Richtung nach der Grenze von Schantung. II. Von Kiautschou nach Ichoufu und von dort weiter durch Baiwuhsien nach Tsinanfu". Art. IV: "An den genannten Bahnlinien entlang, in einem Abstand von 30 Li von den Linien, wie besonders in Poschau und Weihsien an der Linie Kiautschou-Tsinanfu, sowie in Ichoufu-Tsinanfu, wird deutschen Unternehmen die Ausbeutung von Kohlenlagern und sonstigen Unternehmungen sowie die Ausführung der notwendigen öffentlichen Arbeiten gestattet". On the role played by the construction of a railway network in Shandong within the German colonization strategies, see K. Mühlhahn, Deutsche Vorposten im Hinterland: Die infrastrukturelle Durchdringung der Provinz Schantung, in *Tsingtau*, edited by Hinz and Lind, cit., pp. 146-158.

[43] Laband did not see it that way, *Das Staatsrecht*, cit., vol. 2, p. 275, as "diese Zone ist aber wesentlich verschiedenen von einer sogenannten Interessensphäre; vielmehr hat Deutschland an diesem Gebiete bestimmte weitreichende Rechte, welche nach der im Völkerrecht üblichen Terminologie als Staatsservituten zu bezeichnen sind".

tended to overlap and it was not uncommon for European international lawyers to use the two terms indifferently or interchangeably, we can say that for most of them the sphere of influence had as its object an employable territory, because it does not belong to a political entity capable of satisfying the standards of Western statehood.[44] The related contract was therefore stipulated between Western States that mutually agreed to refrain from any act of interference in the area under the control of the other.[45]

The agreements establishing the sphere of interest also produced the same effect of excluding the counterparty and the same claim to extend this exclusion to the states to which the contract had been notified and which had not raised any objections. However, they were stipulated directly with a non-Western State and therefore with a political entity that, formally holder of the sovereign rights over the territory in question, appeared unable to resist the military or economic requests of the European powers and suffered the substantial compression of its own governmental power.[46]

For the German jurists it was easy to see in the 50 km strip that ran around Qingdao Bay the perfect realization of this theoretical figure and to derive a *Staatsservitut* from the constraint it placed on the deployment of Chinese power over its territory.[47]

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[44] In this sense (the so-called *Vorbehaltstheorie*) Laband, ibid., pp. 276-277; R. Adam, Völkerrechtliche Okkupation und deutsches Kolonialstaatsrecht, in "Archiv für öffentliches Recht", 6, 1891, pp. 283-285; F. von Liszt, *Völkerrecht systematisch dargestellt* (1898), 9th ed., Haering, Berlin, 1913, p. 83; K. Freiherr von Stengel, *Die Rechtsverhältnisse der deutschen Schutzgebiete*, Mohr, Tübingen und Leipzig, 1901, pp. 4-5. For not a few German authors, however, it was not possible to recognize in the sphere of influence only a territory on which a State reserved a right to future exploitation, but "der Souveränität des Kolonialstaates unterworfene Länder, in denen allerdings die Staatsgewalt noch nicht aufgerichtet" (cd. *Souveränitätstheorie*): Schack, *Das deutsche Kolonialrecht*, cit., p. 71; Albert Zorn, *Gründzüge des Völkerrechts*, 2nd ed., Weber, Leipzig, 1903, pp. 66-68; Franz Josef Sassen, Die staatsrechtliche Natur der deutschen Schutzgebiete, in "Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft", 8, 1906, pp. 607-608.

[45] The confusion arose above all from the fact that often German-speaking jurists qualified as sphere of interest what other Western jurists called sphere of influence and therefore distinguished between "Interessensphäre" and "Interessenzone", see K. Gareis, *Deutsches Kolonialrecht. Eine orientierende Schilderung der aussereuropäischen Erwerbungen des Deutschen Reiches und Darstellung ihrer Rechtsordnung*, 2nd ed., Emil Roth, Giessen, 1902, pp. 3-4; 48; O. Köbner, Das deutsche Kolonialrecht, in Franz von Holtzendorff und J. Kohler, *Encyklopädie der Rechtswissenschaft in systematischer Bearbeitung*, 6th ed., Duncker & Humblot und J. Guttentag, Berlin, 1904, vol. 2, p. 1087; A. Weissmüller, *Die Interessensphäre. Eine kolonialrechtliche Studie, mit besonderer Berücksichtigung von Deutschland*, Boeglersche Buchdruckerei, Würzburg, 1908, p. 66; P. Heilborn, Interessensphäre, in *Wörterbuch des Völkerrechts und der Diplomatie*, edited by J. Hatschek and K. Strupp, De Gruyter, Berlin, vol. 1, 1924, pp. 550-552. The two figures are instead kept distinct by Liszt, *Völkerrecht*, cit., p. 83, n. 5 (who, however, overlaps the concepts of "Interessensphäre" and "Hinterland"); and Schack, *Das deutsche Kolonialrecht*, cit., pp. 86-87.

[46] Così R. Quadri, *Corso di diritto coloniale*, 4 ed., Cedam, Padua, 1964, pp. 35-36.

[47] Jellinek, Die staats- und völkerrechtliche Stellung Kiautschous, cit., p. 503. On the complex legal nature of international easements, see P. Fabre, *Les servitudes dans le droit international public*, Rousseau, Paris, 1901; G. Crusen, Les servitudes internationales, in "Recueil des cours de l'Académie international de la Haie", 1922, vol. 28, Hachette, Paris, 1929, F. A. Váli, *Servitudes in International Law: a Study of Rights in Foreign Territories*, P.S. King & Son Ltd., London, 1933.

Again, this was not a novelty. Through the reception operated by the German public lawyers between the late 1600s and early 1700s, the nineteenth-century international lawyers' doctrine made the territory the object of a real State law and carried the category of servitude into international law as well.[48]

Still unable to systematically shape international law without resorting to private law models and engaged in the process of State building from an organicist perspective, the founders and the first great protagonists of the new science of international law saw in sovereignty the publicist projection of property law and attributed to the State a full and exclusive dominium over the territory.[49] Towards the end of the century, the affirmation of a legal positivist paradigm strengthened this line of interpretation and led jurists to admit that a State could, under certain conditions, accept a partial limitation of its sovereignty, recognizing a real right in favor of another public subject permanent on its territory.[50]

On the other hand, for those who had tried to build the relationship between territory and State beyond any analogy with private law, the *imperium* was not a projection of the concept of *dominium* in the field of public law and therefore it was profoundly wrong to consider the territory as a thing upon which the State exerted a real right. If in fact, as Fricker already wrote at the end of the 1860s, the territory was a necessary element of the State, it could not at the same time also be an object of it. The territory was identified with the State and through this identification, on the one hand, it spatially qualified the sphere of State sovereignty, on the other it allowed both the overlap between State and people, and the exercise of its

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48 I. Clauss, *Die Lehre von den Staatsdienstbarkeiten historisch-dogmatisch entwickelt*, Verlag der Laupp'schen Buchhandlung, Tübingen, 1894, pp. 106 ss.

49 Without any pretense of completeness, albeit with different nuances and often recognizing their exceptionality, the following authors admit the establishment of international easements A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart*, (1844), Schroeder, Berlin, 8th ed. 1888, pp. 105-109; J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, Beck, Nördlingen, 1868, p. 164. F.F. Martens, *Völkerrecht. Das internationale Recht der civilisirten Nationen systematisch dargestellt* (1881), German transl. C. Bergbohm, Weidmann, Berlin, vol. 1, 1883, pp. 489-490; P. Fiore, *Il diritto internazionale codificato e la sua sanzione giuridica* (1890), 3rd ed. Unione Tipografico Editrice, Turin, 1900, pp. 402-404. Among French jurists, P. Pradier Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines*, Durand et Pedone Lauriel, Paris, 2 vol., 1885, pp. 395-406; F. Despagnet, *Cours de droit international public*, Larose, Paris, 1894, pp. 190-192; H. Bonfils, *Manuel de droit international public*, Rousseau, Paris, 1894, pp. 176-178. In this sense also the doctrine in English, R. Phillimore, *Commentaries upon international Law* (1854), 3rd ed., Butterworths, London, 2 vol., pp. 281-283; W.E Hall, *A Treatise on International Law* (1880), 4th ed., Clarendon Press, Oxford, 1895, p. 166; L. Oppenheim, *International Law*, Longmans, Green and Co., London, 1905, vol. 1, pp. 273-281.

50 According to A. von Bulmerincq, *Das Völkerrecht, oder das internationale Recht systematisch dargestellt,* Mohr, Freiburg, 1889, pp. 289-290, international servitudes contradicted the concept of sovereignty, showing the outdatedness of the old dogmas of its unity and indivisibility, but they were a fact that had to be taken into account. Their institution had only to respect the constitutional dictates of the granting State and, obviously, not to compress governmental power to the point of preventing its very existence. The same viewpoint is also shared by P. Heilborn, *System des Völkerrechts entwickelt aus völkerrechtlichen Begriffen*, Springer, Berlin, 1896, p. 9.

imperium on the people who lived within its borders.[51] There could therefore be no room for servitudes in international law. According to the German jurist, the analogy with private law was not enough to attribute meaning to an operation that could have been carried out without introducing such a destabilizing concept as that of reality into international law. "The right to exercise sovereign power (*Hoheit*) over the territory of a foreign State or the limitation of another State in the exercise of its territorial sovereignty (*Gebietshoheit*) does not demonstrate – as Fricker wrote – the reality of this right".[52] In fact, these rights stemmed from contractual obligations legitimately assumed by two sovereign states. Accepting a squeeze of one's governmental power, restricting the spatial scope of its exercise through a contract was "unworthy" for a State; however, it was not an illegal operation as it was an expression of the sovereignty of the State itself.[53]

Fricker's these were not followed up by European international lawyers.[54] Even those who refused to construct the State-territory relationship in the forms of private law found it extremely advantageous to bring the most diverse compressions of the sovereign power of a State on its territory back to a flexible category capable of absorbing the concessions of railway/telegraph lines, coal deposits, troop passages and stationing, condominiums, concessions for administration and leasing, settlements or finally neutralized territories.

Despite his strong emphasis laid in the *Allgemeine Staatslehre* on Fricker's merits in building the relationship between State and territory outside private law, Jellinek himself could not help qualifying as *Staatsservitut* the limitations imposed on China on the fifty kilometer strip around Qingdao Bay.[55] Listz, perhaps the most severe critic of the application of servitudes in international law, in order to reaffirm the international character of the Sino-German agreement of 1898 not only admitted that the contractual form had been chosen to disguise a transfer of rights of sovereignty without hurting both Chinese sensibilities and the wishes of other powers, but he also had to avoid any comment on article 1 of the treaty.[56]

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[51] C.V. von Fricker, *Vom Staatsgebiet*, Ludwig Friedrich Fues, Tübingen, 1867, p. 67. See on Fricker and more generally on the relationship between on State and territory, A. Di Martino, *Il territorio dallo Stato nazione alla globalizzazione. Sfide e prospettive dello Stato costituzionale aperto*, Giuffrè, Milan, 2010, pp. 191 ss.

[52] C.V. von Fricker, *Gebiet und Gebietshoheit*, Verlag der Laupp'schen Buchhandlung, Tübingen, 1901, p. 72.

[53] Fricker, ibid., p. 71: "Man kann nicht sagen, dass das Völkerrecht dieses Rechtsverhältnis eingeführt hätte, wie der Gesetzgeber die Privatdienstbarkeiten einführt, d.h. die Möglichkeit derselben billigt. Die Völkerrechtsgemeinschaft hat nirgends diese Billigung ausgesprochen, sie hindert nur solche Verträge nicht, weil sie im Allgemeinen jedem Staat die Sorge für sich selber überlässt!"

[54] An important exception is represented by Liszt, *Das Völkerrecht*, cit., p. 76: "Es ist völlig irreführend, in diesen Fällen von (positiven und negativen) völkerrechtlichen Servituten oder Staatsservituten zu sprechen. Denn ganz abgesehen davon, daß an Stelle des praedium dominans der berechtigte Staat und seine Angehörigen treten, fehlt im Regelfall der dingliche Charakter dieser Berechtigungen."

[55] Jellinek, *Allgemeine Staatslehre*, cit., pp. 405-406; see also p. 397. Jellinek, Die staats- und völkerrechtliche Stellung Kiautschous, cit., p. 503.

[56] Liszt, *Das Völkerrecht*, cit., p. 156.

4. Two Jurists, a Lease and the Ghost of Great Britain

For Jellinek, however, all of this was not enough to say that there was something new or to worry about in the Sino-German *Pachtvertrag*. The automatic restoration of Chinese sovereignty at the end of the 99 years, the prohibition of assignment to third parties and finally the maintenance of the status of subject for the Chinese residing within the concession were all clear indications of an unfinished territorial transfer and survival of the ultimate sovereignty of China.[57]

The contract posed some problems. Most German jurists believed, in fact, that the contract and then the Kaiser's decree had produced a "disguised" or "factual" transfer of Chinese sovereignty.[58] In an article published in January 1898 in the Bavarian magazine *Allgemeine Zeitung*, one of the German jurists who devoted himself mostly to colonial law, Karl Freiherr von Stengel, wrote that the stipulation of the lease contract had produced a compression of Chinese sovereignty in the area identified by the agreement which determined the "actual cession" of the territory itself. In his opinion, the ninety-nine-year term was only fictitious and the purchase was "permanent and definitive".[59] According to international law, he continued, the contract was suitable for transferring sovereignty to the Reich and making Jiaozhou Bay German, without this having any constitutional consequences. From this it followed that if from an international law point of view the distinction between metropolitan territory and colonial territory was not relevant, because both of them were subject to an exclusive power of the State, this distinction became decisive for domestic law. For Stengel, therefore, Jiaozhou, like all other German colonial possessions, was not part of the Reich. Removed from the jurisdiction of the Bundesrat and the Reichstag, it was entrusted in compliance with art. 4 of the 1871 constitution, under the governmental power of the Kaiser.[60] The first German organic law on colonial matters, the 1886 *Schutzgebietgesetz*, assuming as its premise the differentiation between metropolitan territory and colonial territory, led back to the exclusive competence of the emperor the exercise of legislative and executive power and referred the regulation of private, criminal and procedural law relationships to the consular law of July 10, 1879.[61]

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[57] Jellinek, ibid., pp. 498-499.

[58] Stengel, *Die Rechtsverhältnisse der deutschen Schutzgebiete*, cit., pp. 17; 22-23; Zorn, *Grundzüge des Völkerrechts*, cit., p. 78; Liszt, *Das Völkerrecht*, cit., p. 156; Köbner, *Deutsches Kolonialrecht*, cit., pp. 1086-1087. A summary of the different positions in P. Heilborn, Kiautschou, in *Wörterbuch des Völkerrechts und der Diplomatie*, edited by Hatschek and Strupp, cit., vol. 2, pp. 643-646; and above all R. A. Norem, *Kiatschou Leased Territory*, University of California Press, Berkeley, 1936, pp. 57-75.

[59] K. Freiherr von Stengel, *Der Erwerbung von Kiaut-tschou vom Standpunkt des Völkerrechts und Staatsrecht betrachtet*, in "Allgemeine Zeitung", 31.1.1898, n° 24, pp. 3-4;

[60] *Ibid.*

[61] Cf. M. Grohmann, *Exotische Verfassung. Die Kompetenz des Reichstags für die deutschen Kolonien in Gesetzgebung und Staatsrechtswissenschaft des Kaiserreichs (1884-1914)*, Mohr Siebeck, Tübingen, 2001, pp. 43-65; J. Zollmann, German Colonial Law and Comparative Law 1884-1914, in Th. Duve (ed.), *Entanglements in Legal History* (Global Perspectives on Legal History 1), Max-Planck-Institut für europäische Rechtsgeschichte, Frankfurt am Main, 2014, pp. 253-294, http://dx.doi.org/10.12946/gplh1. With particular

Only one month after the publication of Stengel's article, another important protagonist of the late nineteenth-century German debate on colonial law, Conrad Bornhak, speaking from the pages of the *Deutsche Kolonialzeitung* offered a partially different interpretation of the *Pachtvertrag*.[62] The contract produced a real transfer of sovereign power from China to Germany, but only for the ninety-nine years indicated in the text. "The name does not correspond to the object," wrote Bornhak. On the one hand, in fact, it was not a real private law contract, as there was no payment of a fee and the tenant was granted a full "*Staatsherrschaft*"; on the other hand, however, it was not a sham agreement that masked a definitive sale. Its peculiarity was precisely the time limit. One could smile at its introduction, added the German jurist, but it determined the nature of the contract, forcing the Reich to leave Jiaozhou at the expiration of ninety-nine years, and above all preventing it from being able to freely dispose of it.[63]

It was therefore impossible to escape the complexity of the contractual figure. On the contrary, it was necessary to investigate its origins by studying the reasons that had led, first within the Ottoman Empire and then in the Far East, to the use of legal models in which the distinction between public and private was discolored or in which sovereignty and property came to overlap.

Bornhak and Jellinek, a few months apart from each other, offered different readings, but both of them underlined the Anglo-Saxon influence: the former identified the original matrix of the German agreement in the English diplomatic practice and, the latter, in the leasehold contract. In fact, it seemed natural to the two jurists that English law had inspired both the policy followed by the diplomacies of other powers in giving legal form to the occupation of important portions of the Chinese territory, and the interpretation of the same unequal treaties by the Western consuls.[64] Notwithstanding this, they were both well aware that the transplant of a contract governed by private law into another legal-spatial context required important adjustments. It should also not be forgotten that the arrival of the leasehold in China was only the last act of a journey that began long ago in Italy. This type of contract, in fact, as the Anglo-Saxon doctrine had not failed to underline, evoked the *emphyteusis* of Roman law and more generally all those contractual forms that in the Middle Ages fell into the category of the *locatio ad longum tempus.*[65] Based on the premise of the doubling of the *dominium* into *dominium directum* and *dominium utile*, they appeared particularly functional to the definition of ownership relations in a country where all the lands formally belonged

reference to the problem of citizenship of colonial subjects see the recent book of N. Camilleri, *Staatsangehörigkeit und Rassismus. Rechtsdiskurse und Verwaltungspraxis in den Kolonien Eritrea und Deutsch-Ostafrika (1882-1919)* (Global Perspectives on Legal History 19), Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main, 2021, http://dx.doi.org/10.12946/gplh19.

62 C. Bornhak, Der völkerrechtliche Pachtvertrag, in "Deutsche Kolonialzeitung", 3.2.1898, p. 1.

63 *Ibid*.

64 Jellinek, Die staats- und völkerrechtliche Stellung Kiautschous, cit., pp. 505-506.

65 P. Grossi, *Locatio ad longum tempus. Locazione e diritti reali di godimento nella problematica del diritto comune*, Morano, Pompei, 1963, remains fundamental.

to the sovereign and therefore could only be given in concession, lacking the possibility of recognizing an absolute private ownership. Matthew Bacon in the mid-eighteenth century defined lease for years as a cross between usufruct (estate for life) and a tenancy at will.[66] The duration of the contract, however, was variable and depended on the feudal traditions of the region in which it was concluded. It was thus possible to pass from twenty-five-year contracts stipulated in the Eastern part of the country and in the Midlands to those linked to the tenant's life in the area between the Peak District and the southern coast of the country, or again, as happened in Lancashire and Cheshire, to leases that were extinguished with the death of the last of three persons identified in the contract, normally the tenant, wife and eldest child or at the end of the ninety-ninth year.[67] These last two hypotheses ended up overlapping and, starting from the end of the eighteenth century, not only was the time of three lives made to correspond to ninety-nine years, but it also began to be increasingly used as a reference time limit for long-term leases.[68]

However, it does not seem that the ninety-nine-year term was the main reason capable of justifying the re-inclusion of the Qingdao Bay concession contract within the leasehold category, but rather the absence of a fee among the requisites required for its configuration. In fact, if the lease required the tenant to pay the lessor a fee for the enjoyment of the thing and the fruits it produced (BGB § 581), in the leasehold – Jellinek wrote citing Blackstone – the payment of the rent was not an essential requirement for the validity of the contract, but only a "natural" element.[69] Finally, excluding that the *Pachtvertrag* could be qualified as a simple lease made it possible to avoid embarrassing dogmatic forcing, such as considering the taxes that Germany would have received from the subletting or sale of the concession land as fruits and the expenses incurred for the improvement state of the places as rent.

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[66] M. Bacon, *A Treatise on Leases and Terms for years*, Strahan, London, 1798, p. 1. The *lease for years* was made, Bacon writes, *ibid.*, "for those who held large districts and tracts of lands, being unacquainted with the arts of husbandry and tillage, found it their interest to lease out their desmesnes, which for want of care and cultivation lay waste, and afforded them little or no profit; and this way of letting for years was thought best to answer the design and intentions of the lord, as well as the expectations of the tenants too great a power over the lord, because then they would have had a property in the freehold, and suffering disseinsins, or seigned recoveries to be had against themselves, might have shaken or endangered the inheritance of the owner: and on the other side, if they had leased their land only at will, few would have been willing to bestow any great pains or industry upon so precarious a possession, which the arbitrary will and pleasure of a peevish lord might have defeated".

[67] C. Clay, Lifeleasehold in the Western Countries of England, in "The Agricultural History Review", 29,2, 1981, p. 83.

[68] Bacon, *A Treatise*, cit. The long term lease was introduced in America by the English colonists, initially in the cities of Baltimore and Philadelphia. Then it became of general use in the States of the Union starting from the seventies of the nineteenth century, cf. the interesting booklet written by a real estate agent: S. McMichael, *Long Term Land and Leaseholds including Ninety-Nine Years Leases*, The Forman-Basset and Co, Cleveland, 1921, at the request of the National Association Real Estate Boards.

[69] Jellinek, Die staats- und völkerrechtliche Stellung Kiautschous, cit., p. 502: "Ein Pachtzins ist kein Essentiale, sondern ein Naturale der englischen Pacht"; see also p. 504. In this way also Bornhak, *Der völkerrechtliche Pachtvertrag*, cit., p. 1: "Von einem Pachtzinse ist nicht die Rede […] Der Pachtzins ist unwesentlich."

At the same time, though, his tracing back to the (original?) Anglo-Saxon archetype was not able to provide a completely satisfactory explanation of the legal nature of this strange contract.[70] As Bornhak writes, the inapplicability of the rules of private law responded to an unstoppable principle of internal necessity which had to be reckoned with. A new colonial drive pushed Germany towards the East and required the identification of unprecedented contractual instruments. Taking seriously what Jellinek himself had written in a classic text such as *Die Lehre von den Staatenverbindungen* on the impossibility of bringing the legal figures created by practice and diplomacy back into known dogmatic categories,[71] the German jurist saw in the *Pachtvertrag* a new form of territorial transfer, albeit subject to certain conditions. The colonial dimension was the characterizing element that determined its exceptionality and therefore its substantial non-classification, justifying not only the recourse at the end of the 99 years, but also, upon its expiry, the use of other legal instruments capable of keeping Germany in possession of the settlement.

For Bornhak, therefore, the Reich, in search of a model, had looked at the diplomatic practice of the greatest colonial power of the time and had found inspiration in the treaty that Great Britain and the Free State of Congo had concluded in Brussels on May 12, 1894 to define their respective spheres of influence in Central and Eastern Africa.[72] With this agreement, England had leased to King Leopold II some territories between the twenty-fifth and thirtieth meridian, bounded to the north by the tenth parallel and to the south by the northern shore of Lake Albert, as long as the Congo continued to be a Belgian colony. The lease should have rewarded Belgium for having recognized the Anglo-German treaty of 1.7.1890 (Helgoland-Zanzibar Treaty) which defined the borders of the English and German sphere of influence in Central East Africa and constituted a protection zone suitable for blocking French expansion into Egyptian Sudan.[73] At the same time, the treaty was particularly benefi-

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[70] The impossibility of accepting an automatic return of the *Pachtvertrag* within the lease led German jurists to study Chinese property law, identifying the possibility of separating the transmission of surface rights from the maintenance of the nudum ius on the land of the fund. For profound analogies with the Western legal tradition and evidence of Chinese influence in the definition of the institution, see F. Rolf Landmann, *Die europäischen Handelskolonien in China. Rechtliche Natur des Begründungsaktes unter besonderer Berücksichtigung des völkerrechtlichen Pachtvertrages*, Voigt & Gleiber, Frankfurt am Main, 1911, pp. 34-37 and above all O. Franke, *Die Rechtsverhältnisse am Grundeigentum in China*, Dieterich, Leipzig, 1903, pp. 87 ss. See also P. Hoang, *Notion techniques sur la proprieté en Chine avec un choix d'actes et de documents officiels*, Shanghai, Imprimerie de l'Orphelinat de T'ou-Sè-Wè, 1920 (The first edition, in Latin, is from 1891), in particular pp. 6-9.

[71] Jellinek, *Die Lehre von den Staatenverbindungen*, cit., p. 35.

[72] Agreement between Great Britain and His Majesty King Leopold II, Sovereign of the Independent State of the Congo relating to the Spheres of Influence of Great Britain and Independent State of the Congo in East and Central Africa, Bruxelles 12.5.1894, in Treaty Series, n. 15, published by Her Majesty's Stationery Office, London, 1894, pp. 2-4. A comment on the agreement can be read in: *État indépendant du Congo et Gran-Bretagne* (international article), "Revue générale de droit international public", 1, 1894, pp. 374-392.

[73] Vertrag zwischen Deutschland und England über die Kolonien und Helgoland, 1.7.1890, in *Das Staatsarchiv. Sammlung der offiziellen Aktenstücke zur Geschichte der Gegenwart*, Duncker & Humblot, Leipzig, vol. 51, 1891, p. 151; v. G.N. Sanderson, The Anglo-German Agreement of 1890 and the Upper Nile, in "English Historical Review" 78,306, 1963, pp. 49-72 e la tesi di dottorato di D. N. Pyeatt, *Heligoland*

cial to England. The Free State of Congo in fact undertook to enter into a similar lease agreement with which it ceded to Great Britain a strip of 25 kilometers from the northernmost port of Lake Tanganyika to the southernmost point of Lake Albert, for the same indefinite period of time.[74]

In Bornhak's eyes the treaty appeared to be a veritable legal monstrosity. He not only had introduced an unprecedented mutual rental agreement into the international law discourse, but had ended up strengthening England's position in Central East Africa. Through him, in fact, the English Crown had taken control of a territorial area that really belonged to Congo, while it had ceded a territory that was not its own, that is, a territory of which it was not well known whether to be considered Egyptian or whether, qualifying as *terra nullius*, it was susceptible to occupation.

From a Eurocentric perspective, the perplexities of the German jurist were acceptable. In fact, it was not easy to bring the treaty back into existing legal figures. On the one hand, the contractors were two civilized states, therefore two subjects of public law, on the other it was a rental contract without the provision of a fee or a term that concealed an alienation subject to termination conditions, according to what is read in the editorial article published in the same 1894 on the *Revue Générale de Droit Public*.[75]

The choice of an exclusively European point of view, however, continued the unknown commentator of the Revue, would have been profoundly wrong. What could not be accepted in Europe appeared less "shocking" in Africa. The emergence of a new contractual practice responded to the needs of a different world, far from the rites and forms of the "old European law of the people". Africa was a different legal space that needed its own law, "an African international law", the main feature of which was "elasticity", i.e. the ability to adapt to different political, economic and social situations. This allowed the international lawyers to exclude that the world was ready to stand on a single international law and at the same time freed the public lawyers from asking for the extension of metropolitan systems in the African colonies. At the same time, it also justified the legitimacy of legal transactions that would have been

and the Making of the Anglo-German Colonial Agreement in 1890, Texas Tech Press, Lubbock, 1988; più in generale P. M. Kennedy, *The Rise of the Anglo-German Antagonism, 1860-1914*, George Allen and Unwin, London, 1980; J. Fossli Gjersø, The Scramble for East Africa. British Motives Reconsidered, in "Journal of Imperial and Commonwealth History", 43,5, 2015, pp. 831-860.

74 Agreement between Great Britain and His Majesty King Leopold II, cit., art. 2: "Great Britain grants a lease to His Majesty King Leopold II, Sovereign of the Independent Congo State, of the territories hereinafter defined, to be by him occupied and administered on the conditions and for the period of time hereafter laid down. The territories shall be bounded by a line starting from a point situated on the west shore of Lake Albert, immediately to the south of Mahagi, to the nearest point of the frontier defined in paragraph (a) of the preceding Article. Thence it shall follow the watershed between the Congo and the Nile up to the 25th meridian east of Greenwich, and that meridian up to its intersection by the 10th parallel north, whence it shall run along that parallel directly to a point to be determined to the north of Fashoda. Thence it shall follow the thalweg of the Nile southward to Lake Albert and the western shore of Lake Albert to the point above indicated south of Mahagi".

75 *État indépendant du Congo et Gran-Bretagne*, cit., pp. 379-380. Along these lines Landmann, *Die Europäischen Handelskolonien in China*, cit., pp. 37-38.

impossible to carry out in Europe.[76] The thesis that the global legal order was crossed by a multiplicity of regulatory systems and was based on multiple international rights, however, was not new. Since the 1830s, jurists in Europe and in the United States had identified international law as a product of Christianity, starting a reflection on the legal instruments to be used in building relations with peoples of different civilizations and faiths. Given the impossibility of the latter to implement Christian international law due to an insuperable cultural backwardness, they confined the possibility of a single legal system to the metaphysics of natural law, by introducing many imaginary international rights to the real world. More than forty years before the pages of the *Revue* hoped for the introduction of a *droit international africain*, in a conference at the Massachusetts Historical Society dedicated to the first opium war in China, John Quincy Adams had identified at least seven different international rights:

> "We have separate and different Law of Nations for the regulation of our intercourse with the Indian polities of our own continent; another Law of Nations between us and the woolly headed natives of Africa; another with the Barbary powers and the Sultan of the Ottoman Empire; a Law of Nations with the Inhabitants of the Isles of the Sea […] and lastly a law of Nations with the flowery Land, the Celestial Empire, the Manchoo-Tartar Dynasty of Despotism".[77]

Outside Europe the continuous overlaps between property and sovereignty, the emergence of territorial spaces removed from the governmental power of States or other public entities, and the continuous use of private law categories or legal models of the balance sheet did not only constitute an exception to Western international law, nor did they trivially violate it. On the contrary, they were perceived by the most sensitive jurists as the signal of a strong energy that required them to give legal form to the new demands of social life. In Germany, Jellinek and Bornhak had moved in this direction, starting in the mid-nineties of the nineteenth century a research path that from the interest in the modification of the State-territory relationship and the emergence of forms of weak State subjectivity had led them to China and to the Sino-German *Pachtvertrag*.[78] A few years later other jurists began to work under the

[76] *État indépendant du Congo et Gran-Bretagne*, cit., p. 379.

[77] J. Quincy Adams, Lecture on the War with China delivered before the Massachusetts Historical Society, December 1841, in "The Chinese Repository", 11, 1842, p. 276. On the insuperable difference between Christian nations and other populations, see also Caleb Cushing, North American plenipotentiary in China, who, a few months after the signing of the Sino-American treaty of Wangxia (3.7.1844), in a letter to Secretary of State John Calhoun, strongly excluded the very possibility of a common law of nations, Mr. Cushing to Mr. Calhoun, 29.9.1844, in U.S. Congressional Serial Set, 28th Congress, 2nd Session, Senate Documents (Serial Set n° 450), Washington, Gales and Seaton, 1845, vol. 2, 58, p. 12 (1-14) The idea that alongside the international law of Christian nations there was also an African international law had already emerged clearly in the decision of the Supreme Court of the United States presided by John Marshall on a famous case concerning the slave trade, *The Antelope*, 23 U.S. (10 Wheaton) 66 (1825), p. 121.

[78] C. Bornhak, *Einseitige Abhängigkeitsverhältnisse unter den modernen Staaten*, Duncker & Humblot, Leipzig, 1896; Jellinek, *Ueber Staatsfragmente*, cit.

auspices of the Austrian jurist and the theme of territorial concessions in China appeared in the writings by Catellani and Cavaglieri, in Italy, and of Perrinjaquet and Gerard, in France.[79]

5. Between Africa and China

However, the Sino-German *Pachtvertrag* posed particular problems not only because it was not easy to reconstruct its genealogy, but also because the provisions contained therein introduced new perplexities and further references to African experiences.

If, in fact, the absence of rent and the temporal limitation of the transfer were certainly two aspects that could recall the strange agreement signed between Great Britain and the Congo Free State, the history of the diplomatic practice of Western colonialism in Africa offered more and better examples. Among these, the island of Zanzibar is perhaps the most interesting.

At the center of the Arab, Persian, Indian and Portuguese trade routes and then an important slave market in East Africa, Zanzibar, starting from the 1880s, was the object of the interests of Great Britain, Germany and Italy.[80] The British arrived first, projecting their influence since 1861 thanks to the arbitration award with which Lord Cunning had brilliantly resolved the dynastic conflicts between the sultans of Zanzibar and Muscat and freed the island from Oman's *suzeraineté*.[81] With France distracted by its sights on Madagascar and Italy owing its small enclave on the Red Sea to the Anglo-Saxon interest and support, and at the same time

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79 A. Cavaglieri, *Il diritto internazionale e alcune recenti concessioni di territori*, Manuzio, Verona, 1903; Id., Il diritto internazionale ed il rapporto giuridico tra Stato e territorio, "Archivio giuridico", 73, 1904, pp. 77-127; Id., *Contributo alla definizione di alcune figure del diritto pubblico contemporaneo*, estratto da "Rivista di diritto internazionale", Tipografia dell'Unione cooperativa editrice, Rome, 1906; E. Levi Catellani, *I "settlement" europei e i privilegi degli stranieri nell'Estremo Oriente*, Ferrari, Venice, 1903; Id., *L'Estremo Oriente e le sue lotte*, Treves, Milan, 1904; Id., I privilegi degli stranieri in Oriente e nell'Estremo Oriente: condizione attuale e tentativi di riforma, in "Rivista di diritto internazionale", 9, 1915, pp. 3-22; Id., *La penetrazione straniera nell'Estremo Oriente. Sue forme giuridiche ed economiche*, Barbera, Firenze, 1915; L. Gerard, *Des cessions deguisées de territoires en droit international public*, Imprimerie Nancienne, Nancy, 1903; J. Perrinjaquet, *Des cessions temporaires de territoires*, Giard & Brière, Paris, 1904.

80 B. Nicolini, *Il sultanato di Zanzibar nel XIX secolo: traffici commerciali e relazioni internazionali*, L'Harmattan Italia, Turin, 2002; J. Glassman, *War of Words, War of Stones. Racial Thought and Violence in Colonial Zanzibar*, Indiana University Press, Bloomington, 2011; J. Prestholdt, The Island as Nexus: Zanzibar in the Nineteenth Century, in T. Falola, R.J. Parrott and D. Porter Sanchez (eds.), *African Islands: Leading Edges of Empire and Globalization*, University of Rochester Press, Rochester, 2019, pp. 317-344; with particular reference to the relationship between India and East Africa v. T.R. Metcalf, *Imperial Connections: India in the Indian Ocean Arena*, 1860-1920, University of California Press, Berkeley, 2007, pp. 165 ss.

81 Arrangement for the Settlement of Differences between the Sultan of Muscat and the Sultan of Zanzibar, and the Independence of their respective States, 2.4.1861, in *Report of International Arbitral Awards*, vol. XXVIII, United Nations, New York, 2007, pp. 107-114. Cf. R. Bhacker, *Trade and Empire in Muscat and Zanzibar. The Roots of British Domination*, Routledge, London, 1992, pp. 191-193; R. J. Blyth, *The Empire of the Raj. India, Eastern Africa and the Middle East 1858-1942*, Palgrave, New York, 2001, pp. 41-48.

any possibility of future colonial development in the Horn of Africa, the only obstacles to England's expansionism policy in the region could therefore only be placed by Germany. After taking possession of Togo and Cameroon, the Reich was in fact now turning its gaze towards Oceania and the east coast of Africa.[82] As it is known on February 27, 1885, breaking all delay, Bismarck first placed the territories purchased by Carl Peters in the hinterland in front of the island under German protectorate, entrusting control to the *Gesellschaft für deutsche Kolonisation* and then, a few months later, had imposed on the sultan of Zanzibar the recognition of the new *Schutzgebiete* and the stipulation of a trade and navigation treaty.[83] This determined, in the course of 1886, the redefinition of the territorial rights of the sultanate of Zanzibar itself with Great Britain, and, between the end of October and the beginning of November of the same year, its re-establishment within the German and British spheres of influence.[84] The two European powers mutually committed themselves not to hindering the acquisition and economic exploitation of the territory and entrusted their respective colonial companies, the British East Africa Company and the *Deutsche Ostafrika Gesellschaft*, with the task of proceeding with full control of the island, thus transforming a simple sphere of influence into a real protectorate.[85] This allowed Mackinnon, president of the English company,

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[82] F. F. Müller, *Deutschland – Zanzibar – Ostafrika. Geschichte einer deutschen Kolonialeroberung 1884-1890*, Rütten & Loening, Berlin, 1959. See also M. Pesek, *Koloniale Herrschaft in Deutsch-Ostafrika. Expeditionen, Militär und Verwaltung seit 1880*, Campus Verlag, Frankfurt am Main, 2005.

[83] Schutzbrief für die Gesellschaft für deutsche Kolonisation, 27.2.1885, in *Archiv des deutschen Kolonialrechts*, edited by N. Wagner, 2nd ed., Wesseling, Brühl, 2008, pp. 113-114. L'ultimatum (11.8.1885) is edited in *The Map of Africa by Treaty*, vol. 2, *Great Britain & France to Zanzibar*, edited by E. Hertslet, 3rd ed., printed by His Majesty's Stationery Office by Harrison and sons, London, 1909, p. 657. The treaty of friendship, trade and navigation can be read instead in: Freundschafts-, Handels- und Schiffahrtsvertrag zwischen dem Deutschen Reich und dem Sultan von Zanzibar, 20.12.1885, in "Deutsches Reichsgesetzblatt", 1886, n. 28, pp. 261-284. Cf. J. Bückenford, *Schwarz-Weiss-Rot über Ostafrika. Deutsche Kolonialpläne und afrikanische Realität*, LIT Verlag, Münster, 1997, pp. 219-222; and above all A. Perras, *Carl Peters and German Imperialism 1856-1918. A Political Biography*, OUP, Oxford, 2004, pp. 99-103.

[84] France also participated in the first census of the domains of the sultanate of Zanzibar, *Procès verbal containing the unanimous opinions of the Delegates of Great Britain, France and Germany, with reference to the Maritime, Littoral, and Continental Possessions of the Sultan of Zanzibar*, Zanzibar, 9.6.1886. The representatives of the German and English governments met again a few months later to focus more precisely on the limits of the sovereignty of the Sultan of Zanzibar and the borders of their respective spheres of influence, Agreement between the British and German Governments respecting the Sultanate of Zanzibar and the opposite East African Mainland and their Spheres of Influence, 29.10-1.11.1886. Cf. Müller, *Deutschland – Zanzibar – Ostafrika*, cit., pp. 252-266; J.G. Deutsch, Inventing an East African Empire: the Zanzibar Delimitation Commission of 1885/1886, in P. Heine and U. von der Heyden (eds.), *Studien zur Geschichte des deutschen Kolonialismus in Afrika. Festschrift zum 60. Geburtstag von Peter Sebald*, Centaurus-Verlagsgesellschaft, Pfaffenweiler, 1995, pp. 210-219. The last act of this long process was art. XI of the Anglo-German Treaty of 1.7.1890, (so-called Heligoland-Zanzibar Treaty). The treatises are all published in *The Map of Africa by Treaty*, edited by Hertslet, cit., vol. 2, cit., respectively at pp. 874-876; 882-886; 899-906. More generally on Anglo-German rivalry and cooperation, see U. Lindner, *Koloniale Begegnungen. Deutschland und Großbritannien als Imperialmächte in Afrika 1880–1914*, Campus Verlag, Frankfurt a. Main 2011, pp. 8-20.

[85] The English protectorate on Zanzibar was established by the Heligoland Zanzibar Treaty itself of 1890. Widely J.E Flint, *Zanzibar 1890-1950*, in V. Harlow, E.M. Chilver, A. Smith (eds.), *History of East Africa*,

to conclude a lease agreement on May, 24 1887 with Barghash bin Said, Sultan of Zanzibar, for the lease of a long stretch of coast for 50 years. The agreement formally recognized the sultan's sovereignty over the granted territory, but gave the British East Africa Company full powers. This resulted in the imposition of taxes, the enactment of laws, the establishment of courts of justice and the appointment of magistrates, the occupation of unoccupied land, freedom of action with indigenous leaders, the purchase of public and private land.[86] For the entire duration of the concession, the English company would have had control of customs and would have provided for the collection of customs duties, guaranteeing the sultan 5% of the revenue. The following year (28.4.1888) the *Deutsche Ostafrika Gesellschaft* entered an identical treaty, obtaining a portion of the East African coast between the Umba and Rovuma rivers in concession from Barghash bin Said, again for a period of 50 years.[87]

Italy came last. Four years after a treaty of friendship (1885) was signed, Vincenzo Filonardi managed to obtain the institution of an Italian protectorate over Obbia (8.2.1889) and Migiurtinia (7.4.1889), and in the summer of the same year he promoted the stipulation of a strange contract between the British East Africa Company and the Italian government (12.8.1889) with which the English company undertook to cede to Italy the administration of the cities of Mogadishu, Brava, Berca, Chisimaio once obtained in concession from the sultan of Zanzibar.[88] The sale was confirmed, however, only on August 12, 1892 when Barghash

vol. II, Clarendon Press, Oxford, 1965, pp. 641-671; J. Galbraith, *Mackinnon and East Africa 1878-1895. A Study in the 'New Imperialism'*, CUP, Cambridge, 1972. In September 1885 the *Gesellschaft für deutsche Kolonisation* was renamed *Deutsch-Ostafrikanische Gesellschaft* (DOAG). For a picture of the legal problems, see Schack, *Das deutsche Kolonialrecht*, cit., pp. 357-369; H. Sippel, Recht und Herrschaft in kolonialer Frühzeit. Die Rechtsverhältnisse der Schutzgebiete der Deutsch-Ostafrikanischen Gesellschaft (1885-1890), in Heine and Vanderheyden (eds.), *Studien zur Geschichte des deutschen Kolonialismus*, cit., pp. 466-494; K. Richter, Deutsch-Ostafrika 1885 bis 1890: Auf dem Weg vom Schutzbriefsystem zur Reichskolonialverwaltung. Ein Beitrag zur Verfassungsgeschichte der deutschen Kolonien, in „Forum historiae iuris", https://forhistiur.de/2000-01-richter/

86 Concession granted by the Sultan of Zanzibar to British East African Association, 24.5.1887, in *The Map of Africa by Treaty*, edited by Hertslet, cit., vol. 1, pp. 339-345. With the treaty of 5.3.1891 (Supplementary agreement concluded between His Highness Seyyid Ali, Sultan of Zanzibar and Mr. George Mackenzie, director in chief of the Imperial British East Africa Company, 5.3.1891, ibid., pp. 365-366) the sultan made the concession perpetual. It must also be remembered that the first agreement of 1887 was followed in the following years by further concessions (31.8.1889; 4.3.1890; 5.3.1894) and that in December 1895, after the possessions administered by the British East Africa Company became part of the British protectorate on East Africa, the Crown entered into a new agreement in which, as consideration for the concession, it assumed the obligation to pay the sultan an annual rent (Hertslet, ibid., p. 382).

87 Küstenvertrag der DOAG vom 28.04.1888 mit Zanzibar, in *Archiv des deutschen Kolonialrechts*, edited by Wagner, cit., pp. 333-336. With the exchange of notes of 27 and 28 October 1890, between Great Britain and Germany, the indemnity to be paid to the Sultan was established as compensation for the permanent transfer of the coastal strip covered by the treaty, in *The Map of Africa by Treaty. Great Britain and Germany to United States*, edited by E. Hertslet, 3rd ed., vol. 3, printed for His Majesty's Stationery Office, by Harrison and Sons, London, 1909, p. 907. See now Camilleri, *Staatsangehörigkeit und Rassismus*, cit., pp. 60-64.

88 Agreement between the British East Africa Company and the Italian Government, 3.8.1889, in *The Map of Africa by Treaty*, edited by Hertslet, cit., vol. 3, pp. 1088-1091. Cf. the green paper *Somalia italiana*

bin Said transferred the administration of the four port cities to the Italian government for a period of twenty-five years, in exchange for the payment of an annual fee.[89]

The differences with the Chinese lease agreements, however, were not few. First of all, the Italo-Zanzibar agreement, although signed in the sultan's name, was concluded by two Western States and signed by their respective diplomatic agents. It also provided that Italy would administer the Somali cities in the name and on behalf of Barghash bin Said and above all that the same agreement would be perfected only if, on the one hand, it was approved by a subsequent treaty between Great Britain and Italy (art. 11), and, on the other, if the latter had actually exercised the rights granted to it and had occupied the four cities within a period of three years starting from July 1893.[90] If it had failed, again in the following three years, to follow up on the agreement or had evacuated the cities, it would have had to pay a heavy indemnity (Article 1 Supplementary Treaty). Most of all, the sultan authorized the Italian government to transfer the administrative management of the four cities to a private company (art. 2). Following the Anglo-Saxon model, Italy therefore renounced the direct administration of the new colonial purchase and transferred its rights to the company of consul Vincenzo Filonardi, a great protagonist of Italian politics in the Horn of Africa.[91]

(*1885-1895*). *Documenti diplomatici presentati al Parlamento italiano dal ministro degli Affari esteri*, Tipografia della Camera dei Deputati, Rome, 1895; on Italian colonialism in Somalia the excellent synthesis by N. Labanca, *Oltremare. Storia dell'espansione coloniale italiana*, Il Mulino, Bologna, 2002, pp. 85-94; see J.S. Galbraith, Italy, the British East Africa Company and the Benadir Coast, 1888-1893, in "Journal of Modern History", 42, 1970, pp. 549-563; L. De Courten, L'amministrazione coloniale italiana del Benadir. Dalle compagnie commerciali alla gestione statale (1889-1914), in "Storia contemporanea", 9,1 1978, pp. 115-156; 2, 303-333; F. Grassi Orsini, *Le origini dell'imperialismo italiano. Il caso somalo (1896-1915)*, Milella, Bari, 1980.

89 Concession of Benadir Ports granted by the His Highness the Sultan of Zanzibar to the Government of His Majesty the King of Italy, 12.08.1892, in *The Map of Africa by Treaty*, edited by Hertslet, cit., vol. 3, pp. 1094-1100. The full powers granted to the Italian government extended to the stretch of sea facing the four cities (art. 1). The treaty was renewable for another 25 years (art. 7).

90 The latter provision was contained in the Supplementary Agreement to the Agreement between Zanzibar and Italy of 12th August 1892 stipulated in Zanzibar again by the consuls Rodd and Cottoni on May 15, 1893, Herstlet, ibid., pp. 1100-1102. With the actual occupation and the expiry of the three-year provisional administration, Italy would have been required to pay an annual fee of 160,000 rupees. In the treaty, however, the parties carefully avoided the word canon and preferred the term premium. In art. 8 of the treaty of 1892, in fact, we read that as consideration for the right to collect customs tariffs for the duration of the contract, the Italian government had to pay "to the Government of His Highness the Sultan of Zanzibar a sum of 40.000 rupees, as a premium, on the Italian Administration which form the object of the present Concession, and thereafter the sum of 40.000 rupees at the end of each quarter of the European year." Art. 3 of the Supplementary Treaty specified that the payment would have to take place only at the end of the three years of provisional administration, that is, when the treaty would definitively enter into force. Finally, the Additional Article to the Agreement of 12th August 1892 of 1.09.1896 stipulated in Zanzibar by Cecchi and Basil Cave reduced the amount of the premium to 30,000 rupees per quarter (Hertslet, ibid., p. 1103).

91 G. Finazzo, *L'Italia nel Benadir. L'azione di Vincenzo Filonardi 1884-1896*, Edizioni dell'Ateneo, Rome, 1966.

6. From Zanzibar to Tianjin

Let us leave aside the Italian imperial aspirations and the colonial dreams of Filonardi and let us stop for a moment in Zanzibar, before resuming the return journey to China.

Between the signing of the sublease agreement of the cities of Mogadishu, Brava, Berca, Chisimaio by the British East African Association and the Italian government in 1888 and their definitive transfer to administration by Bargash Bin Said in 1892, the English association, which became a State-chartered company, had obtained the perpetuity of the territories granted in March of the previous year. With a supplementary agreement, in fact, the two parties had canceled the 50-year time limit provided for in the1887 lease treaty and had introduced an annual rent of 80,000 pounds, thus adding a further element of complexity to a legal figure with uncertain boundaries, suspended between public law and private law.[92] The company acted in the name of the sovereign and under its own banner, but was Bargash bin Said still the holder of sovereign power? Did the coastal strip that is the object of the lease agreement still belong to him or had the perpetuity of the rent made even the ultimate sovereignty that formally belonged to him evanescent, making it a *nudum nomen*? And again, could it be enough to have entrusted the last shred of one's sovereignty to an annual fee and to the provision that should never be considered a flat-rate payment?[93] It is not difficult to find an answer to these questions, also considering that, starting from 1890, Zanzibar had become an English protectorate and that with the appointment of Sir Gerald Portal as consul general, the following year Great Britain had intervened decisively in the internal affairs of the island, by taking control of the finances and, in 1893 after the death of Ali bin Said and the accession to the throne of Hamad bin Thwayni, it had also obtained the renunciation of the sultan to appoint 'its' department heads. Finally, in 1895, with the dissolution of the British East African Company and the establishment of the British protectorate over East Africa, it took possession of the indemnity paid by Germany to the sultan as compensation for the permanent transfer of the portion of the coast indicated in the *Küstenvertrag* of 1888, to cover the debts following the bankruptcy of the English company.[94]

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[92] Supplementary Agreement concluded between His Highness Seyyid Ali, Sultan of Zanzibar and Mr. George Mackenzie, Director in Chief of the Imperial British East Africa Company, 5.3.1891, in *The Map of Africa by Treaty*, edited by Hertslet, cit., vol. 1, pp. 365-366. It should also be remembered that the first agreement of 1887 was followed in the following years by further concessions (31.8.1889; 4.3.1890; 5.3.1894) and that, in December 1895, after the possessions administered by the British East Africa Company became part of the British protectorate over East Africa, the crown entered into a new agreement in which, as consideration for the concession, it assumed the obligation to pay the sultan an annual fee (Herstlest, ibid., p. 382). Brief notes on lease agreements in Africa in Michael Strauss, Territorial Leasing and Diplomacy in International Law, Brill, Leiden, 2015, pp. 70-74.

[93] Supplementary Agreement concluded between His Highness Seyyid Ali, Sultan of Zanzibar and Mr. George Mackenzie, cit., p. 366.

[94] Küstenvertrag der DOAG vom 28.04.1888 mit Zanzibar, in *Archiv des deutschen Kolonialrechts*, edited by Wagner, cit., pp. 333-336. With the exchange of notes of 27 and 28 October 1890, between Great Britain and Germany, the indemnity to be paid to the Sultan was established as compensation for the permanent transfer of the coastal strip covered by the treaty.

If, therefore, only an obtuse legal formalism could circumvent the problem posed by the loss of any form of real territorial control and insist on the persistence of some form of sovereignty of the Sultanate of Zanzibar, those questions are important both because they mercilessly reveal the limits of the juridical discourse, betraying the anxiety of the international lawyers engaged in the search for dogmatic categories capable of reading and interpreting the transformations produced by the imperialist project of the West, and because they forcefully return when we resume the journey to China. In fact, strange perpetual leases had already been used in China by the British, French and North Americans, to give legal form both to the occupation and the exploitation of large portions of land along the Hai River, near the city of Tianjin.

As it is known, Tianjin, which entered the colonial discourse of the West as the seat of the homonymous treaty that ended the second opium war, opened to Western trade in 1860, with the Beijing Convention, under the same conditions observed for other treatyports of the empire.[95] A few months later, on the assumption that the treaty provided for the possibility of renting land and buildings to be used for homes, hospitals, churches or commercial activities, France and England obtained a concession for the areas they had already occupied militarily and claimed their perpetuity.

In the volume of the Treaties series dedicated to the treaties concluded between Great Britain and China, the agreement relating to Tianjin is officially stipulated on September 3, 1861 and is the latest in a series of leases that allowed the European power to have its own concessions in Zhenjiang (23.2.1861), Hankou (21.3.1861), Jujiang (25.3.1861) and to expand the existing one in Guangzhou. However, in the English archives there is no trace of the agreement. All that remains in the Foreign Office papers is, in fact, only the request presented by James Bruce, VIII Earl of Elgin to Prince Gong for the perpetual lease of an area south of Tianjin, a memorandum indicating the boundaries of the future grant and a receipt issued in 1865 by the Chinese district officer to the English consul Mongan for the annual payment of the land lease.[96]

The lack of a lease also characterizes the French concession, the legal basis of which must be sought in the official proclamation of the superintendent of the three northern ports, Chonghou, in an administrative regulation affirming the perpetuity of the territories included in the space ceded to France and especially in Article 10 of the Franco-Chinese treaty of Tianjin to which both documents refer.[97]

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[95] Convention of Peking, 24.10.1860, art. 4; and art. 7 of the equivalent Franco-Chinese convention signed the following day. Both are edited by William Frederick Mayers, *Treaties between the Empire of China and Foreign Powers, together with Regulations for the Conduct of Foreign Trade, Conventions, Agreements, Regulations, etc., etc., etc., The Peace Protocol of 1901, and the Commercial Treaty of 1902*, North-China Herald Office, Shanghai, 1902, respectively, p. 9 and p. 73.

[96] Annex 7, Tien-Tsin, British Concession, in Lease Treaty Series, n° 34, printed and published by His Majesty's Office, London, 1925, p. 26.

[97] The texts referred to are the following: Proclamation du Surintendant des trois ports du Nord à Tien-Tsin, 29.5.1861 in Archives du Ministère des Affaires étrangères (henceforth AMAE), Paris, NS Chine, vol. 286, Concession française de Tientsin 1861-1897, 148 CPCOM P/19231; Règlement relatif à l'af-

Even more uncertain, then, were the origins of the American concession. Through the most favored nation clause, in fact, even the United States had obtained a perpetual concession of their "tract of land" along the Hai River, despite not taking part in the second opium war and remaining neutral even in the two years separating the Tianjin Treaty from the Beijing Convention.[98] Even in this case, however, no official document emerged from the archival investigations relating to a possible territorial acquisition, nor was it possible to obtain any information about the methods by which the land plots were distributed among the American citizens residing there.[99]

Thirty-four years later, when the Reich also succeeded in imposing the opening of its own concession on China, only the British were able to profit from the space obtained, subletting all the land of the settlement with a long term lease lasting 99 years. The American concession, on the other hand, was in a state of complete abandonment, while the French one, penalized by a less favorable geographical location requiring major urbanization interventions and by the concentration of ownership of almost all the land in the hands of Jesuits and Lazarists, had not yet aroused the interest of investors.[100]

It should therefore come as no surprise that, arriving in Tianjin, the Reich officials had begun to study the English administrative system, identifying in the settlement the model to refer to. As Ludwig von Loeper, consul in Hong Kong, wrote to Gustav Adolf Freiherr Schenck zu Schweinsberg, German ambassador to Beijing in August 1895, the ability of the Crown and then of the municipal authority to define which land should be sublet to the highest bidder and which to be destined for public purposes, and above all the identification of clear rules to avoid real estate speculations, had ensured the development of the concession. Thanks to the surpluses deriving from the sale of the land, the revenues obtained from the taxes on river traffic and the choice to impose on investors the urbanization costs of the areas adjacent to the individual lots purchased, the Crown was able to anticipate the sums necessary for the expropriation and the expulsion of the Chinese. At the same time it had managed to carry out the necessary interventions for the nourishment of the coastal lands

fermage à perpetuité des terrains dans les limites de la concession Française à Tientsin (2.6.1861). The regulation is attached to the letter sent by the French consul in Tianjin, Charles Dillon to his ambassador in Beijing, Fréderic Albert Bourée, Tientsin, July, 1881, AMAE (Nantes), Ambassade de France en Pekin 513po/1/262, Concession de Tientsin, dossier 36. Traité d'amitié, de commerce et de navigation conclu à Tien-Tsin, 27.6.1858, in *Recueil des Traités conclus par la France en Extrême Orient (1684–1902)*, art. 10, edited by Lucien de Reinach, Ernest Leroux, Paris 1902, pp. 52–53.

98 N. Vaicbourdt, De la "me too policy" aux ambitions contradictoires: la brève histoire de la concession américaine de Tianjin, 1860-1902, in "Outre-Mers. Revue d'histoire" 382/383, 2014, pp. 27-46, and L. Bernstein, *A History of Tianjin in the early modern times, 1800–1910,* UMI Dissertation Service, Ann Arbor, 1988.

99 It is well worth reading the interesting analysis by the American ambassador to Beijing, Charles Denby, The American Concession at Tientsin, p. 4, appendix n. 1 to Denby's letter to Olney, 3.8.1895, in National Archives and Records Administration at College Park MD (henceforth NARA), Microfilm Publications, Dispatches from U.S. Minister to China (1843-1906), M 92, R 99.

100 Cf. L. Nuzzo, The Birth of an Imperial Location. Comparative Perspectives on Western Colonialism in China, in "Leiden Journal of International Law", 31,3, 2018, pp. 1-28.

and to equip the settlement with docks and an adequate road network. Being without the Chinese and well-organized, it had begun to attract investors and only a few lands remained in the ownership of the Crown. This had led to a very rapid increase in prices within the settlement and to a new interest also in Chinese-owned land outside it and in the Chinese city of Tianjin.[101]

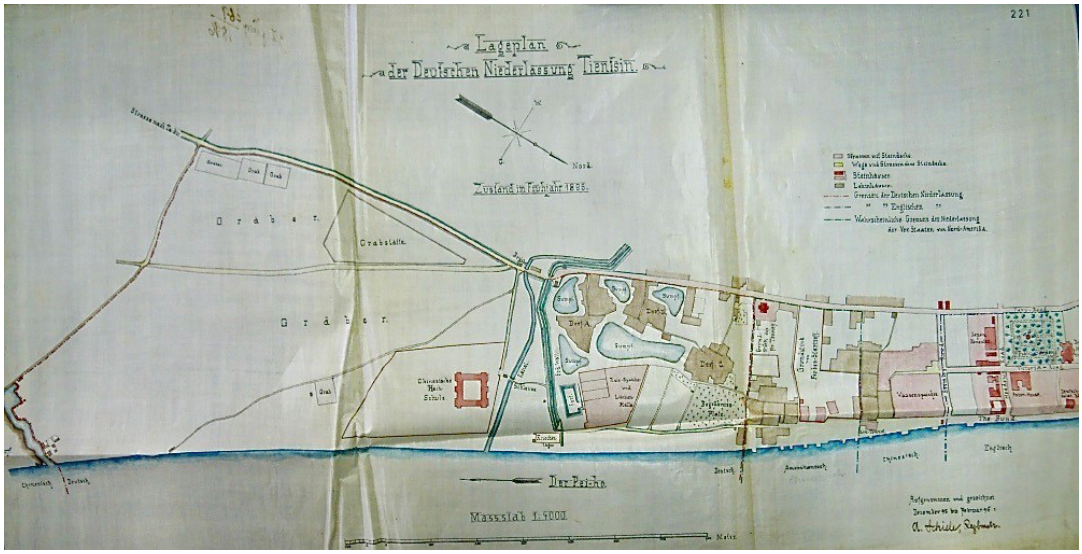
Loeper's memory is of extraordinary interest. In fact, he had been entrusted with both the task of managing relations with Chonghou for the opening of the concession, defining the compensation that the Germans would have to pay to the Chinese for the expropriation of the land included in the settlement, and of starting a complex negotiation with the Americans, worried by the aggressiveness of German colonial policy.

Loeper was convinced that the concession had great potential: in an economy linked to the ability to exploit the great river stemming its destructive force, it offered better chances of docking than the French one, without its coastal land requiring expensive nourishment which the French had instead to resort to.[102] Considering that the demand for land within the English concession far exceeded the supply and that the rents of its lots were extremely high, the new buyers, the consul continued, would inevitably be attracted to invest in the German concession. It was then necessary to quickly define a development plan, set clear rules for the sale of the land and at the same time work to connect the German concession with the English one and with the Chinese city. The real weakness was in fact the remoteness of the German settlement. This explains the insistence of German consular officials, a few months later, that the Americans allow the necessary works for the extension of two roads that would connect the two concessions as well as their interest in the purchase of some US-owned land through which the two roads would pass.[103]

[101] Ludwig von Loeper to Gustav Adolf Freiherr Schenck zu Schweinsberg, August 7, 1895, Promemoria betreffend die Gründung einer deutschen Niederlassung in Tientsin, in Politisches Archiv des Auswärtigen Amtes, Berlin (henceforth PA AA) RZ 9208 R 1040, vol. 2, August 1895 - October 1895, ff. 55r-55v.

[102] The consul acknowledged, however, that "the foundation of the same took place in more difficult conditions than those of the English settlement in 1861" and that some interventions to fill alluvial soils and strengthen the shore were a "matter of life and death for 'settlement itself'" (Loeper, *Promemoria*, cit., f. 56r).

[103] Ibid., ff. 62r-63v.



Map of German settlement in Tientsin[104]

Without urbanization works, or even only without the firm conviction that those interventions would have been generated in the entrepreneurs, the future of the German concession seemed marked.[105] Finding the necessary sums thus became the main problem that the Reich would have to face. The space dedicated to the new concession in English local newspapers, the interest shown by German investors residing in China, the willingness of the *Deutsche Asiatische Bank* to invest a considerable sum and finally the suggestions of Gustav Detring, customs commissioner of Tianjin and adviser to the viceroy of Zhili Li Hongzhan kindled

104 Lageplan der deutschen Niederlassung in Tientsin, aufgenommen und gezeichnet Dezember 1895 – February 1896, by Albert Schiele, Regierungsbaumeister, PA AA, RZ 9208 R 115, B. 4, February 1904 – May 1916, (p. 221). Schiele himself had drawn up a memorandum addressed to the consul of Tianjin von Seckendorff in which he precisely identified the interventions to be carried out, Tientsin 27.3.1896, PA AA, RZ 9208, R 1042, B. 4 April 1896 – Juli 1896. The map had to be attached to this memo.

105 "Von den hiesigen Deutschen – Loeper, *Promemoria*, cit., 67v-68r – werden einige aus Noth heraus, nicht aus Patriotismus, wohl aber aus dem Gesichtspunkte, sich für den Fall des Aufblühens der Niederlassung dort ein Grundstück zu sichern und eventuell von den alsdann steigenden Grundstückspreisen zu profitieren, Ankäufen nicht abgeneigt sein, besonders, wenn sie dieselben unter günstigen Bedingungen effektieren können. Ich kann dabei erwähnen, dass die hiesige Deutsch-Asiatische Bank von dem Berliner Konsortium bereits angewiesen ist, in der deutschen Niederlassung sobald dies möglich sein werde, ein Grundstück zu erwerben und dafür ein Kapital von bis zu 10000 Tael zu verwenden". "Schon das Bekanntwerden der Thatsache – the consul added, ibid., f. 70r –, dass die Kaiserliche Regierung sich entschlossen habe, die mehrfach erwähnten Arbeiten zunächst auf Kosten des Reiches ausführen zu lassen, und dass der Reichstag die erforderliche Zustimmung dazu gegeben habe, würde die Wirkung haben, das Vertrauen in das Unternehmen ganz erheblich zu stärken, da jedermann eine Garantie dafür sehen würde, dass die Ausführung der Arbeiten in einer den Interessen der Niederlassung entsprechenden Weise gesichert sei."

Loeper's hopes, but all of this might still not be enough.[106] In fact, the German government had to be convinced to finance the exploitation of the concession without waiting for the sale of the individual lots. At the same time, it was advisable to rapidly eliminate all obstacles that could have caused a slowdown. This meant, in the first place, that the purchase of the land could not be subject to possession of German citizenship or membership of the *Deutsche Schutzgenossenschaft*; and, secondly, that one could not do without the Chinese.

The consul knew, however, that allowing them to own property within the concession or residing there was a delicate matter. On the one hand, there was both the aspiration of the wealthier classes to leave the Chinese city of Tianjin, moving to the Western settlements and the certainty that the taxes paid by the Chinese would allow the first and most urgent urbanization works to be carried out. On the other, however, the stereotyped representation of their difference, the belief that a great deal of work would be needed "for people to get used to European order and cleanliness" produced insecurity, made the presence of the natives incompatible with the concession transformation project in new social spaces and justified the fear that their arrival would discourage Western investors.[107]

The British, for example – convinced that the project of architectural, economic, social and legal homogenization of their territory could have supported the presence of other Western citizens, if they had shown themselves respectful of the British legal system, but not that of the native population – had given the consular authority the right to revoke the subletting contracts if the concessionaire had allowed Chinese citizens to build or occupy a house within the settlement. At the same time, again in the early years of the concession, they had launched a massive expropriation program and pursued the goal of deporting local communities that had not yet left the concession.[108]

Even the French were not favorable towards the arrival of more Chinese and would have gladly got rid of the villages they had found within their concession. However, the shortage of Western residents and investors interested in establishing themselves in the concession, as well as the difficulties in which it found itself had pushed the consulate towards compromise solutions. Hence, despite having expressly forbidden the Chinese to purchase real estate and land, they had allowed the old residents to continue living within the concession and had only reserved the right to decide from time to time whether or not to initiate expropriation proceedings.[109]

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106 See the biography of Gustav Detring written by V. Schmidt, *Aufgabe und Einfluss der europäischen Berater in China. Gustav Detring (1842-1913) im Dienste Li Hung-changs*, Harrassowitz Wiesbaden, 1984, pp. 73 ss.; Hans Van de Ven, Robert Hart and Gustav Detring during the Boxer Rebellion, in "Modern Asian Studies", 40,3, 2006, pp. 631-662, here pp. 650-652.

107 Loeper, *Promemoria*, cit., f. 68r.

108 *Tientsin Local Land Regulations and General Regulations*, 26.11.1866, Noronha, Hong Kong, 1866.

109 Règlement relatif à l'affermage à perpetuité des terrains dans les limites de la concession Française à Tientsin (2.6.1861), cit. The French consul Gabriel Deveria refers to the derogation in a letter addressed to his English counterpart James Mongan, Tientsin, 7.1.1865, AMAE, Nantes, Consulate de Tientsin, 691 / po / 1/180.

The awareness that the diversity of the temporal context and environmental conditions prevented the reproduction of the English model in the management of relations with the Chinese and that the French were the only real rivals in the race for concessions, did not therefore allow to imagine different solutions, thus leaving to the consul the possibility of entrusting the promulgation of future building and sanitary regulations with the task of harnessing or deactivating Chinese otherness.[110]

Without a strong economic support from the Reich and a clear development plan, however, the taxes paid by the Chinese would not have helped much. The first would have been necessary to instill the necessary confidence in private investors, guaranteeing national interests, and the second would have avoided wasting money, ensuring the optimization of results. Given the scarcity of resources and the presence of only seventeen commercial enterprises and twenty German residents, Loeper proposed the appointment of a commission composed of the consul and German experts residing in Tianjin, for the evaluation of the projects and a double check by the government which was called to definitively approve the works and then to start their execution. The government would have repaid the anticipated expenses, selling the lots at auction and entrusting the urbanization costs and the construction of the quays to the owners of the neighboring or coastal land (72r-72v). Furthermore, in order to avoid speculation and to ensure a more significant German presence, a limit could have been set on the purchase of land and a right of first pre-emption introduced in favor of German companies that had decided to establish themselves in the concession.[111]

The constitution of the municipality would have been the last act, the decisive one, for the development of the settlement. Only an association of resident owners could, in fact, have been able to take on the maintenance and construction of new buildings and, at the same time, provide adequate guarantees to creditors.

But what would have happened if the government had not advanced the necessary sums? Excluding the possibility that the interested parties could acquire the land of the concession freely or through the intermediation of the Chinese authorities, according to Loeper there was only one solution: to ask the banks to intervene and set up a joint stock company, entrusting the State with the exercise a rigorous control activity. Once again the fear of speculative operations guided the consul's strategies and pushed him to ask for the intervention of the Reich, subordinating the carrying out of all construction activities to its authorization and, under its control, the establishment of a deadline for the delivery of the works and verification that the tax burden or customs tariffs were not excessive. Finally, both the urbaniza-

110 "Es wird insbesondere nothwendig sein – Loeper, *Promemoria* cit, f. 68v, wrote –, von vornherein durch baupolizeiliche Verordnungen die Errichtung feuergefährlicher Häuser zu verhindern und vorzuschreiben, dass ein bestimmter Theil eines jeden Grundstückes von Baulichkeiten frei bleiben müsse, um so den auch im englischen Settlement herrschenden, aus gesundheitlichen Rücksichten nothwendigen villenartigen Charakter für die deutsche Niederlassung zu wahren und zu verhüten, dass die Chinesen auf ihren Grundstücken etwa zum Zwecke der Vermietung ganze Häuserviertel erbauen."

111 Ibid., ff. 73v-74r.

tion charges and the sale to the municipality of the buildings and the sale of land to be used for the construction of government buildings should have been imposed on the company after a certain period of time. (75v-77v).

7. Die Deutsche Niederlassung

Finally, on October 30, 1895, the German consul Albert von Seckendorff and two Chinese officials, under the supervision of the powerful superintendent of the northern ports, signed the perpetual lease of a large piece of land of about sixty-seven hectares along the right bank of the Hai River, bordering the English concession, the small US enclave and a strip of land still under Chinese government control and owned by the China Merchants Steam Navigation Company and the Chinese Engineering and Mining Company.[112]

Driven by the risk of a blockage of its commercial traffic in North China due to the docking ban imposed by England on German ships in the ports of Hankou and Tianjin and more generally by a feeling of colonial revanche towards other treaty powers, the Reich won the last delay and, claiming the same rights as France, Great Britain and the United States, wished for "an increase in German reputation in the eyes of the Chinese and a strengthening of Germanism in China" with the opening of a settlement in the two river cities.[113]

As has already happened with the other Western concessions in Tianjin, however, the contract did not clarify the exact boundaries of the settlement and, still at the time of stipulation, the liminal stones were missing. The picture was then made even more uncertain by the ambiguous behavior of the American embassy which, up to that moment, had shown total disinterest in the concession, but at the same time formally opposed the occupation by Germany of some land that he claimed as his own.[114] The problem, already highlighted by Loeper in his Memorandum, of the ways of connecting with the English concession remained unsolved. To reach it, in fact, it was necessary to cross land owned by Chinese and American and, therefore, one would have to rely on their intervention both to keep the road network that led to Taku Road in good condition, and to free the *Bund* from the stalls of Chinese sellers.[115]

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[112] Vertrag über die Ertheilung einer Niederlassung im Vertragshafen von Tientsin an das Deutsche Reich, Tientsin, 30.10.1895, Bundes Archiv, Berlin Lichterfelde (henceforth BArch), R 901, 30901, pp. 11-15. On 3.10.1895 the Reich had concluded a similar lease agreement for the opening of a concession in Hankou, ibid., pp. 8-11

[113] Denkschrift über die deutschen Niederlassungen in Tientsin und Hankau, Berlin 23.03.1898, ibid. (date of dispatch to the Reichstag).

[114] See Vertrag, cit., Zusatz-Bestimmungen ad § 1. On 25.6.1896 the American consul Sheridan P. Read communicated to his German counterpart Karl Christian Feindel the renunciation of any claim of jurisdiction by the United States, in PA AA RZ 9208, 1043 (1896-1897).

[115] Vertrag, cit., § 2. Obtained from the German consul, Seckendorff, the assurance that American citizens could reside and buy land in the German concession under the same conditions as the English settle-

It is not surprising, therefore, that in the contract the attentive German consul only obtained the formal commitment of the Chinese authorities to keep the quay clear and in good condition the stretch of road he was entitled to. At the same time he was also able to convince the Chinese to recognize the German right to carry out the necessary work recognized within one year of the agreement's conclusion, if they Chinese authorities themselves had not done so, and to obtain reimbursement of the expenses incurred.

But there is more. Following the French model, the contract allowed the Chinese to settle even within the German concession; however, those who already resided there were obliged to sell their real estate to their government and abandon the concession within three months.[116] Against the payment of a modest indemnity at the time of signing the contract and an annual real estate tax, in fact, the Reich rented or bought – in the text both terms are used – the land directly from the Chinese government, unloading on the latter the task of managing the complicated expropriation proceedings.[117]

Loeper's concerns, however, did not fail to come true. The German government was not particularly interested in intervening directly in the management of the two concessions and preferred to hand over the administration to the *Deutsche Asiatische Bank* after less than two years.

Founded in 1889 after the collapse in the price of silver had led to the closure of the branches of *Deutsche Bank* in Shanghai and Yokohama, the bank was born from the agreement of a consortium of institutions led by *Deutsche Bank* and *Disconto-Gesellschaft* with the aim to

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ment, the US ambassador Charles Denby invited the consul in Tianjin, Sheridan P. Read, to provide the necessary permits for the continuation of the roads and arranged to inform the secretary of State, Olney. Seckendorff's response to Denby's request is attached to the letter addressed by the latter to Olney on January 25, 1896, in NARA, Despatches from U.S. Minister to China, M92, R100 (1843-1906). On the same day Denby wrote to Seckendorff to express his congratulations on the decision taken, in PA AA RZ 9208, 1043 (1896-1897).

116 Vertrag, cit., § 8; § 12. The § 12 also foresaw a transfer allowance paid by the German government of 10 taels for each family (§ 12).

117 Vertrag, cit., § 9; § 10; § 15. According to the provisions of § 11, the value of the houses that were located within the German settlement was established by a specially appointed mixed commission. "Dieselbe soll jedoch bei Beurtheilung der Sache nach dem Vorbilde der auf die französische Niederlassung Bezug habenden Regulationen, wie sie aus dem Aktenmaterial ersichtlich sind, verfahren und auf keinen Fall übertriebenen Forderungen der Schenken Gehör". Once the land was sold to his government, the owner would have to pass on the contract to the Chinese authorities, indicating the boundaries, conditions and size of the land. The latter would then send the purchase deed to the German consul for its conservation in the land registry (§ 14). If in the contract the land of the concession is leased forever to the German government, in the memorandum addressed by Chancellor von Bulow to the German parliament three years after the conclusion of the contract, Denkschrift, cit., BArch, R 901, 30901, p. 3, it is specified that "in Wirklichkeit aber zum Eigenthum übertragen werden, da das daran einzuräumende Recht nach dem Inhalte der Verträge alle zum vollen Eigenthum gehörigen Befugnisse umfasst". In this sense, the report on the establishment of a real estate register written by the sinologist Max Gerhard Pernitzsch, at that time second interpreter at the German consulate in Shanghai, in PA AA, RZ 9208 1065, p. 1; 18; according to which "Der Ewigpächter hat alle Rechte des Eigentümers, volles Eigentum, was übrigens nie auf Chinesischer Seite bestritten worden ist". The letter from consul Paul von Buri accompanying the report is dated Shanghai 12.6.1908 and is addressed to Chancellor von Bulow.

support German commercial expansion in China and break the monopoly of British banks in the East.[118] The choice of the German government not to take on the urbanization costs directly and not to proceed with the sale of the individual lots and, at the same time, the lack of enthusiasm of the few German entrepreneurs, made the bank's intervention inevitable in order to establish some *Terraingesellschaften* to be entrusted with the purchase of the land and its development. In the first case, in fact, – as stated in an interesting memorial in which the government informed the parliament of the leases concluded in Hankou and Tianjin – the involvement of the Reich in speculative operations "would not have been well reconciled with its position", and it should have been preceded by an authorization from the federal council and the parliament itself. In the second case, however, leaving German entrepreneurs the possibility of acquiring the land of the concessions through the mediation of the Chinese government, or directly from the individual owners, would inevitably have produced a delay in their development. The reports that came from the consulates of Hankou and Tianjin led, in fact, to believe that the German companies in the two Chinese cities would not be willing, nor would they be able to carry out the necessary works and plants.[119]

Between the end of May 1897 and the beginning of February of the following year the German government therefore signed two contracts with which it sold the land included in the Tianjin and Hankou concessions to *Deutsche Asiatische Bank*, reserving only two lots to allocate to the construction of the respective consular and municipal buildings. The Reich also authorized the bank to exploit the coastal facilities and to impose taxes for the docking of boats and the storage of goods.[120] The institute, on the other hand, was obliged to provide

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118 "Der Zweck der Gesellschaft – one reads in the Statut der Deutsche Asiatischen Bank (12.2.1889), Shanghai 1896, in PA AA Peking 9208/1044 – ist der Betrieb von Bankgeschäften und die Förderung des Handelsverkehrs zwischen Deutschland und Asien". The bank was based in Shanghai. Cf. W. Plumpe, Die Deutsche Bank in Ostasien, in Historische Gesellschaft der Deutschen Bank (ed.), *Die Deutsche Bank in Ostasien*, Piper, München/Zürich, 2004, 23-90; also the doctoral thesis by G. Moazzin, *Networks of Capital: German Bankers and Financial Internationalization of China (1885-1919)*, University of Cambridge, 2017, in part. Postal Code. 1. At the beginning of the nineties, France, Russia and Japan, sharing with Germany the objective of freeing their investors from the need to resort to the English credit system, respectively founded the Banque de Indochine, the Russia-Asiatic Bank and the Yokohama Bank. After 1894, that is, after the defeat of China in the first Sino-Japanese war, foreign banks took charge of providing the necessary loans to meet the heavy war indemnities, leading to the internationalization of Chinese finance. For an analysis of the relationships between foreign banks and Chinese financial institutions, see L. Cheng, *Banking in Modern China. Entrepreneurs, Professional Managers and the Developments of Chinese Banks 1897-1937*, CUP, Cambridge, 2003, pp. 10-23; G. Moazzin, Sino-Foreign Business Networks: Chinese Banks in the Chinese Banking Sector 1890-1911, in "Modern Asian Studies", 54,3, 2020, pp. 970-1004.

119 Denkschrift, cit., p. 2. From an editorial that appeared in the "Freisinnige Zeitung" of March 30, 1898, BArch R 901, 30902, we learn that the publication of the Memorial responded to a request for information, presented by the liberal deputy Eugen Richter to the secretary of State, on the two rental contracts referred to in Germany, about three years after their conclusion, very little was still known.

120 Vertrag zwischen der Kaiserlich Deutschen Regierung und Deutsche Asiatische Bank in Berlin wegen Uebernahme der deutschen Niederlassung in Tientsin, Berlin, 29.5.1897, BArch, R 901, 30901. After fifty years, the plants would have been transferred to the (future) German municipality, but the bank would have been entitled to reimbursement of the expenses incurred.

the sums necessary for the expropriation of the land and to provide for the construction of the road network and docks. Once the concession was valued, the bank would proceed with the sale of the land, respecting the constraint of transferring a third of it to German investors and subordinating any sale deed to non-German buyers, to the consul's authorization and to a declaration also received from their respective consular authorities with which they formally recognized the German jurisdiction and the conditions provided for in the contract.[121] The land of the concession, in fact, had not yet aroused sufficient interest and, in the hope of starting its economic development, there was also a need for foreign investors. On the other hand, however, the transformation of a small strip of the Chinese empire into a new social space required new political, economic, legal and architectural practices. It was not an easy or quick task. As can be seen from the contract between the Reich and the *Deutsche Asiatische Bank* and the Memorial for the *Reichstag*, the government planned to proceed quickly with the sale of the lots and the necessary works by authorizing the bank to establish real estate companies in which the German entrepreneurs from Tianjn and Hankou would participate, through the purchase of share packages.

It also intended to give a constitutional structure to the concession, overcoming uncertainties and regulatory gaps. The extension of the consular law of 1879 was not, in fact, sufficient to guarantee the national character of the concession. All new buyers, as we have seen, were subject to the jurisdiction of the German consul; however, at least formally, the territory of the settlement was still an integral part of the Chinese empire and therefore it seemed difficult to extend the right of the Reich even to those who had bought land or real estate within the concession before 1895, that is, before it became German, or even to those who found themselves in the concession without being a resident.

It was therefore necessary to make the settlement a German municipality, requiring all buyers to become shareholders and entrust its administration to a municipal council, made up of the owners. On the other hand, the consul, the highest judicial authority, had the very delicate task of projecting the image of imperial sovereignty on the new territory, supervising the process of drafting the fundamental rules of the concession – statute, police regulations and cadastral law – and seeking a way of mediation between the different and often conflicting needs of the Reich, the German residents, the representatives of other powers and, finally, the Chinese government.[122]

After two years of uncertainty, something was beginning to happen in the small German enclave on the Hai River. Less than a month after the conclusion of the contract with the government, thanks to the acquisition of 50% of the share capital by Cologne entrepreneur Rudolph Wahl, the *Deutsche Asiatische Bank* formed the *Deutsche Niederlassung Gesellschaft*, a real estate company with headquarters in Tientsin which assumed rights and obligations

[121] Vertrag zwischen der Kaiserlich Deutschen Regierung und Deutsche Asiatische Bank, art. 4.
[122] Denkschrift, cit.; Vertrag zwischen der Kaiserlich Deutschen Regierung und Deutsche Asiatische Bank, cit.

towards the government counterpart.[123] As stated in the contract with Wahl and then, more precisely in its statute, "the purpose of the company was the purchase and use of the land included in the concession, as well as the construction of roads, houses, a bulwark and finally the construction of systems for loading ships, warehouses and their management".[124] However, the finalization of the agreement required another two more years of negotiations and correspondence between *Deutsche Asiatische Bank*, the foreign ministry and the *Deutsche Niederlassung Gesellschaft*, during which very little had to happen in the German concession. The expropriations and expulsion of the Chinese inhabitants began, but the land of the concession still did not arouse the interest of German entrepreneurs.[125]

The century was now drawing to a close and in Berlin and Tianjin it was thought of transforming the concession into a German municipality with legal personality. This would have helped to guarantee the certainty of the expectations of future buyers, finally establishing the land register provided for in the contract with the Deutsche Asiatische Bank, in which the consul would have registered the rents to be paid to the Chinese government and all the obligations to which the buyers themselves were bound. At the same time, however, the resentment and anger of the Chinese for the invasive Western presence undermined the fragile political balance of the city.[126] The rebel attacks, the siege of the legation quarter in Beijing, the assassination of the German ambassador Clemens von Ketteler and the declaration of war by Empress Cixi against the eight European powers engaged in the suppression of the insurrection, led to a very harsh response.

"It seems that on the ground civilized nations are up to all sort of things a little of all colors and also to things as not civilized people". This words were written to his mother by Messerotti Benvenuti, Italian medical lieutenant whom we let go sadly from the port of Naples at the beginning of this story. After a voyage of just over a month, his Java had finally arrived in

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123 Vertrag zwischen der Deutsche Asiatische Bank in Berlin und Herrn Rudolph Wahl in Köln a. R., 5.7.1897, § 1; § 2, in PA AA RZ9208 1044.

124 Vertrag zwischen der Deutschen Asiatischen Bank in Berlin und Herrn Rudolph Wahl, cit., § 2; Statut der Aktien-Gesellschaft der Deutschen Niederlassung in Tientsin, art. 3, ibid.

125 The documents are always PA AA RZ9208 1044. The "Freisinnige Zeitung" of 30.3.1898 announced only the beginning of the expropriations, BArch R 901 3092. One year later, 11.3. 1899, the first owners' assembly called to approve the Police Regulations was held under the presidency of consul Eiswaldt. Only six people attended. A brief account can be read in an article in the Tientsin Time of 25 March 1899. The police regulation was also approved on 25 March 1899. Also in 1899 the first *Baupolizeiordnung für das Gebiet der Deutschen Niederlassung in Tientsin 1899*, BArch, R 901 30907 was enacted.

126 The cadastral law was promulgated on 25.10.1900 (Verordnung betr. die Rechte an Grundstücken und die Anlegung von Grundbüchern in deutschen Niederlassungen in Tientsin und Hankow) after a new one had come into effect on 7.4.1900 *Konsulargerichtsbarkeitgesetz*, in BArch R 901 30912. Thanks to the *Gesetz über die Bildung deutscher Kommunalverbände in den Konsulargerichtsbezirken,* 3.6.1905 (see the text in Philipp Zorn, *Die Konsulargesetzgebung des Deutschen Reichs: Textausgabe mit Anmerkungen und Sachregister*, 3rd ed., Berlin, Guttentag, Verlag Buchhandlung, 1911, pp. 479-480) on 18.1.1906 the *Bundesrat* granted the German settlement the status of *Kommunalverband*. This allowed the entry into force of the *Gemeindeordnung für die Niederlassung in Tientsin* of 9.12.1905 in PA AA RZ 9208 1051.

Dagu Bay and was moored among "war ships of all nationalities".[127] A few days later, at the end of a "disgusting" crossing, the steamship on which the Bavarian soldier, the protagonist of the story by Günter Grass, was arrived. "When they arrived in Tien-Tsin, everyone was already there: British, Americans, Russians, even real Japanese and small troops from smaller nations. The British were actually Indians".[128] For both, however, there was little to do: by now Tianjin was "very safe" and in Beijing "it was all over": "there wasn't even a Chinese dog anymore".[129] A pity, as the German soldier wrote to his fiancée.

However, if the war had ended quickly and if, for the Italian medical lieutenant, "this whole China business was just a swelling", a new history of Western colonialism was about to begin.[130] The Chinese city of Tianjin was occupied, entrusted to a provisional government composed of representatives of the allied powers and divided into four sectors, each of which controlled by a different power: France, Great Britain, United States, Japan.[131]

In early September 1901, before the Tianjin Provisional Government experience ended, the Chinese government was forced to sign the so-called Beijing Protocol, formally recognizing the winners the right to occupy "certain points" which they had already taken physical possession of during military operations, "in order to keep communications between the capital and the sea free".[132] Russia, Austria, Italy and Belgium thus managed to conquer their portion of China along the Hai River, while France, England, Germany and Japan obtained an expansion of their concessions.[133]

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127 Messerotti Benvenuti, Ta-ku, 30.8.1900, in Messerotti Benvenuti, *Un italiano nella terra dei Boxer*, cit., p. 14.

128 Messerotti Benvenuti himself gave news of the arrival of three German steamers in a letter to his mother dated 7.1900, ibid., p. 16. Grass, *Mein Jahrhundert*, cit., p. 8.

129 The first and third passages quoted are taken from a letter by Messerotti Benvenuti sent from Tianjin to his mother on 08.26.1900, therein p. 21, the second from Grass's account, ibid., p. 2.

130 Messerotti, Tianjin, 26.8.1900, ibid., p. 21.

131 Cf. *Procès Verbaux des Sciénces du Conseil du Government Provisoire du Tientsin*, The China Times Ltd, Tientsin, 1911 (?); Pierre Singaravélou, *Tianjin Cosmopolis. Une autre histoire de la mondialisation*, Seuil, Paris, pp. 79 ss.

132 Boxer Protocoll, Peking, 7.9.1901, art. IX, *Treaties between the Empire of China and Foreign Powers*, ed. Mayers, cit., p. 294.

133 Singaravélou, *Tianjin Cosmopolis*, cit., pp. 270-276. The text of the new German contract is in PA AA RZ 9208 1045 (a copy is also in BArch901 30915), Vertrag über die Erweiterung der deutschen Niederlassung in Tientsin, Tientsin, 28.6.1901. The contract, however, confirmed an occupation already carried out as shown in the letters sent by the German consul Zimmermann to the French, English, Belgian, Japanese, Russian and US consuls on April 17, 1901, again in PA AA RZ 9208 1045. About the Austrian presence in Tianjin see the doctoral thesis of G. Hörtler, *Die österreichisch-ungarische Konzession von Tientsin*, 2 vols., Wien 1984. On the Italian concession in Tianjin, L. Nuzzo, Italiani in Cina: la concessione di Tien Tsin, in *Diritto, istituzioni e economia nell'Italia fascista*, a cura di A. Mazzacane, Nomos, Baden-Baden, 2002, pp. 255–281. More recently M. Marinelli has returned to the theme, in: The Genesis of the Italian Concession in Tianjin: a Combination of Wishful Thinking and Realpolitik, "Journal of Modern Italian Studies", 15,4, 2010, pp. 536-556 and A. De Angeli, Italian Land Auctions in Tianjn: Italian Colonialism in early twentieth Century China, ibid., pp. 557-572.

Conclusions

At the beginning of the 20th century, the opening of new concessions marked the beginning of a new chapter of a metropolitan space inhabited by more than a million people, crossed by a multiplicity of physical, legal and social boundaries and composed of two distinct but connected entities: the Chinese city and the foreign concessions. Defined by social practices, symbolic representations, and legal categories, it was a complex and hybrid space which did not coincide simply with the area defined by the entity as a State, nation, or city. On the contrary, Tianjin and its concessions were an imperial location placed under different foreign powers at the same time in competition and cooperation between them, and crossed by different and unstable strategies of governance as well as equally different and unstable Chinese forms of resistance or negotiations.[134]

Combining a micro and a global historical approach and moving between legal doctrine, diplomatic texts and archival documents I perceived the organization of urban space as an instrument able to modify the relationships between sovereignty, territory and subjects. At the same time, I read the historical processes as spatial processes that started with a land appropriation. Accordingly, I assumed the German colonial project in China as spatial processes that happened in a determined space as well as a process that assume the control of space and production of a new social space as its objective.[135]

This allowed me to de-exoticise the strange lease agreements with which Germany, after Great Britain, France and the United States, gave legal form to the occupation of large portion of Chinese territory and transformed them into a new social space. Founded in different moment, administered in different way and with a different degree of development, all the foreign concessions in China, were built on the basis of an identical contractual archetype that recalled the English lease.

The juridical ambiguity of these spaces excited the imagination of jurists who look to the Balkan area and Africa in search of similar cases in which ownership and sovereignty overlapped and in which the compression of the State power was entrusted to the categories of private law.

It is not by chance, therefore, that the German perspective has seemed particularly useful for their critical reading. In Germany, in fact, since the mid-nineteenth century, the relationship between State and territory had been the subject of a lively debate that saw in Jellinek not only one of the most important protagonists, but also one of the first public lawyers to grasp the importance of the German experience in China for an updated reading of that relationship.

The Concessions, in fact, allowed to historicize and localize the concept of sovereignty. The lease agreements from which they originated could not be dismissed as a trivial violation

134 L. Nuzzo, Cities and International Law: an Imperial Perspective, in Janne Nijmann and Helmut Aust (eds.), *Research Handbook on International Law and Cities*, Eldgar, London, 2021, pp. 52-63.

135 See also Nuzzo, The Birth of an Imperial Location, cit.

of international law or a simple exception to Western international law. On the contrary, they proved that the relationship between governmental power, territory and subjects beyond the borders of the West worked in a different way and, consequently, that even violent compressions of State sovereignty over a portion of its territory were not incompatible with the concept of State itself. At the same time those concessions problematized the exclusive identification between the State and international subjectivity. They could not be considered a State, but they could not be brought back within simple local and administrative bodies either. According to Jellinek they were *fragments of State* that is political subjectivities provided with territories, subjects and some degree of autonomy. In this way, autonomy, a concept that has been used by German legal doctrine to qualify not sovereign entities but with some legislative, jurisdictional and administrative powers, became the conceptual category to include all political entities that, for an alteration of the relationship between sovereignty, territory and subjects, did not comply with the requirements of statehood. Accordingly, Western International lawyers started to classify them by simply identifying their degree of autonomy and self-governance.[136]

In the twentieth century, the legal framework became more complex and the number of hybrid colonial or semi-colonial subjectivities increased. Colonial, mandate and trust territories, internationalized cities and non-self-governing territories regulated by Chapter XI of the United Nations Charter, were different political subjects that, although not fully independent, enjoyed some degree of autonomy. They definitively testified the limits of the category of the sovereign nation State, providing to international lawyers the opportunity to examine the imprecise and flexible concept of autonomy in the second half of the twentieth century.[137]

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136 C. Bornhak, *Einseitige Abhängigkeitsverhältnisse Unter den modernen Staaten*, Duncker & Humblot, Berlin 1896; A. Cavaglieri, *Il Diritto Internazionale e Alcune Recenti Concessioni di Territorio*, Manunzio, Verona 1903; L. Gerard, *Des Cessions Deguisées de Territoires en Droit International Public*, Imprimerie Nancienne, Nancy 1903.

137 R. Wide, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away*, OUP, Oxford 2008.